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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1156

CHECKER MOTORS CORPORATION,
Petitioner,

v.

CHRYSLER CORPORATION and CHRYSLER MOTORS CORPORATION,
Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on January 6, 1969.

Opinions Below

The opinion of the United States District Court for the Southern District of New York denying petitioner's motion for partial summary judgment and a preliminary injunction is reported at 283 F. Supp. 876 (S.D.N.Y. 1968) and is reprinted as Appendix A hereto, *infra.*

The opinion of the United States Court of Appeals for the Second Circuit which affirmed the decision of the Dis-

trict Court is reported at —— F. 2d —— (2d Cir. 1969), CCH 1969 Trade Cases, ¶ 72,672 and is reprinted as Appendix B hereto, *infra*.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on January 6, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

Is a published rebate plan, which provides that the sales subsidiary of an automobile manufacturer will pay a direct rebate or refund of $183 per vehicle to purchasers of taxicabs from its authorized franchised dealers, and which is actively promoted by such dealers, illegal *per se* under Section 1 of the Sherman Act on the ground that it is a device which enables a manufacturer, after having parted with dominion over its product, to tamper with and affect the ultimate resale prices paid by the dealers' customers?

Statutes Involved

The statutory provisions involved are Section 1 of the Sherman Act, 15 U.S.C. § 1; Section 4 of the Clayton Act, 15 U.S.C. § 15; Section 16 of the Clayton Act, 15 U.S.C. § 26. The pertinent provisions of these statutes are reprinted as Appendix C hereto, *infra*.

Statement of the Case

The Parties

Petitioner Checker Motors Corporation (hereinafter referred to as "plaintiff") has been engaged since 1922 in the manufacture and sale of automobiles, primarily

"purpose-built" taxicabs, which are vehicles specifically designed, engineered and constructed for use as taxicabs (4a, 66a, 190a).[1] Plaintiff sells its taxicabs throughout the United States. The District Court recognized that prior to 1963, New York City provided one of plaintiff's major markets (Appendix A, p. A1).

Respondent Chrysler Corporation (hereinafter referred to as "defendant Chrysler") is the nation's third-largest automobile manufacturer. It sells most of its output to its wholly-owned sales subsidiary, defendant Chrysler Motors Corporation (hereinafter referred to as "defendant Chrysler Motors"), which in turn sells to franchised Chrysler dealers who resell the vehicles to the public (120a). Defendants' answer admits that they are engaged "in the business of selling automobiles in interstate commerce" (39a).

Unlike plaintiff, Chrysler does not manufacture a "purpose-built" taxicab. Its taxicabs are regular passenger cars (mainly Dodges and Plymouths) which are modified for taxicab use by the addition of heavy-duty transmissions, axles, and other special equipment (84a-86a).

The Chrysler Rebate Plan

In 1962 defendants instituted a rebate plan, which was accurately described by the District Court as follows:

> "In 1962, in order to promote the sale of its taxicabs, Chrysler instituted the 'Commercial Fleet Value Program' ('Rebate Plan' herein), under which, throughout the United States, purchasers of two or more taxicabs from Chrysler-authorized qualified dealers could, upon completing a form and returning it to Chrysler, receive a rebate of up to $200 per taxi-

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[1] Numbers followed by the designation "a" refer to pages in Plaintiff-Appellant's Appendix in the United States Court of Appeals for the Second Circuit.

cab from the manufacturer.[2] In 1966 and 1967, the plan was altered to include purchasers of a single taxicab and the rebate was set at $183 per vehicle. Chrysler dealers have advertised the program, although the accounting and payments have been handled by Chrysler." (Appendix A, p. A2)

The rebate plan is not only advertised by Chrysler dealers (74a, 82a), but expressly provides that it is limited to taxicabs sold at retail and delivered "by an authorized Chrysler Motors Corporation dealer". The 1967 rebate plan, which is typical of the plans employed in other years, except for the changes noted by the District Court, is reprinted as Appendix D hereto, *infra*.[3]

Defendants admitted in their papers below that this rebate is not offered or paid to customers who buy the same Chrysler-built models for private pleasure car use (147a).

Defendants have never denied or rebutted plaintiff's assertion in the courts below that the rebate plan was promoted with particular vigor in New York City, at least initially in order to saturate New York City with Chrysler-built taxicabs and thus afford defendants a basis for a nationwide advertising campaign promoting the sale of Chrysler-built passenger cars (69a-70a). The theme of this advertising campaign was that customers should purchase Chrysler-built pleasure cars because identical models were being successfully subjected to the enormous wear and tear and abuse that is the lot of a New York City taxicab (76a-77a). Indeed, defendants admitted in their brief in the District Court that their rebate plan was developed at a

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[2] The Commercial Fleet Value Program also applied to certain other types of commercial vehicles but this case is concerned solely with the plan's impact in the taxicab field.

[3] In their 1968 rebate plan, defendants reverted to their pre-1966 provision restricting the availability of the $183 rebate to purchasers of two or more taxicabs.

time when Chrysler's passenger car sales were lagging and Chrysler was financially desperate and willing to try anything (1729-1723).[4]

Defendants could easily afford to pay such a rebate on taxicabs in order to promote the sales of their pleasure cars. Defendants' taxicab sales in New York City amount to only 0.002% (two one-thousandths of one percent) of their total annual vehicle sales everywhere (1966 sales of 3,351 Chrysler-built taxicabs in New York City out of total Chrysler-built passenger car sales of 1,399,741) (192a).

Defendants are, in effect, using their huge volume of pleasure car sales to subsidize their promotional $183 rebate on taxicabs, which is granted despite the fact that the Chrysler-manufactured taxicabs contain special heavy-duty components which should ordinarily make them more costly to manufacture than comparable pleasure car models that are sold at a higher price (84a-85a).

Plaintiff Checker, which is primarily in the business of manufacturing and selling purpose-built taxicabs, and whose sales of pleasure cars amount to less than half of its taxicab sales (16a, 2270), is in no position to pay a similar subsidy and has been unable to match the $183 Chrysler rebate (70a).

The Impact of the Chrysler Rebate Plan on Plaintiff Checker's Business

While defendants' rebate plan has had the effect of cutting into plaintiff's taxicab sales throughout the United States, its impact on plaintiff has been particularly devastating in New York City which, as the District Court stated in its opinion, provided one of plaintiff's major markets before 1963 (Appendix A, p. A1).

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[4] Numbers without a letter designation refer to pages in the record which were not reproduced in Plaintiff-Appellant's Appendix in the Second Circuit.

The number of taxicabs that may be licensed in New York City is limited by law to approximately 11,700 (160a) and the District Court stated in its opinion that

> "without attempting to bind the trial court to a market definition . . . the papers submitted indicate that New York City is a separate and distinct market." (Appendix A, p. A22)

The following chart shows that Checker's new sales in New York City dropped from 1,835 taxicabs in 1961 to 262 taxicabs in 1966. During the same period, Chrysler's new taxicab sales in New York City rose from 735 in 1961 to 3,351 in 1966.

NEW YORK CITY

TAXICAB REGISTRATIONS

Date Compiled	*Model Year*	*Checker*	*(Chrysler) Dodge*	*Ford*	*Chevrolet*	*Studebaker*	*Misc.*	*Total*
9/25/61	1961	1,835	735	2,643	263	369	95	5,940
9/24/62	1962	1,476	828	1,427	596	944	26	5,297
9/30/63	1963	1,442	1,861	1,726	370	277	30	5,706
9/28/64	1964	417	3,487	1,789	377	185	8	6,263
9/27/65	1965	202	4,312	1,459	478	...	5	6,456
9/19/66	1966	262	3,351	1,958	...	...	48	5,619

(188a)[5]

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[5] In 1967 Checker's sales rose by 51 units to a total of 313. Chrysler's sales declined from 3,351 to 2,356 because its 1967 Dodge Coronet model was disqualified by the New York City Hack Bureau for not meeting minimum specifications and Chrysler had to substitute a Plymouth model (188a).

A similar sales result is evident from the following table of total annual taxicab registrations (new and old) in New York City:

NEW YORK CITY

TAXICAB REGISTRATIONS

Date	*Checker*	*Ford*	*(Chrysler) Dodge*	*Chevrolet*	*Studebaker*	*Plymouth*	*Misc.*	*Total*
Dec. 1961	3,603	4,176	1,813	729	791	495	116	11,723
June 1962	3,872	3,400	2,026	914	1,080	343	95	11,730
Dec. 1962	4,056	2,938	2,376	953	1,092	315	71	11,737
June 1963	3,795	2,831	2,921	965	981	203	51	11,747
Dec. 1963	3,405	3,093	3,634	865	546	161	45	11,749
June 1964	2,301	3,186	4,834	864	424	106	37	11,752
Dec. 1964	1,776	3,192	5,587	840	246	78	34	11,753
April 1965	1,607	3,089	5,957	821	178	69	32	11,753
Dec. 1965	1,046	3,046	6,867	691	30	48	25	11,753
Aug. 1966	885	2,937	7,261	587	20	53	28	11,771

(15a)

Proceedings Below

The complaint challenges the legality of the rebate plan under the Sherman and Robinson-Patman Acts and also charges defendants with numerous other violations of these statutes (28a-37a). Defendants interposed a counterclaim charging Checker with a number of antitrust violations (41a-57a). Defendants' counterclaim is virtually a carbon copy of an old Government complaint which was dismissed after a full trial in *United States* v. *Yellow Cab Co.*, 80 F. Supp. 936 (N. D. Ill., 1948), *aff'd* 338 U. S. 338 (1949).[6] The

[6] This was the so-called "second Yellow Cab case". In the "first Yellow Cab case", 332 U. S. 218 (1947), this Court upheld the Government's complaint *as a matter of pleading* only.

courts rejected the Government's charges that Checker's sales of taxicabs to its taxicab operating affiliates constituted a monopoly, holding that it was both reasonable and natural, as a matter of business judgment, for these operating companies to purchase Checker's "purpose-built" taxicabs as more suitable for taxicab use in large cities than converted pleasure cars (80 F. Supp. at pp. 943-944).

In April 1967 plaintiff made a motion for partial summary judgment or, in the alternative, for a preliminary injunction to restrain defendants from continuing to use their rebate plan in the New York City taxicab market, where plaintiff contended it was suffering irreparable harm. The motion was denied by Judge Mansfield in an opinion dated March 29, 1968 (Appendix A). Plaintiff thereupon appealed from the denial of a preliminary injunction to the United States Court of Appeals for the Second Circuit, which affirmed the decision of the District Court in an opinion dated January 6, 1969 (Appendix B).

REASONS FOR ALLOWING THE WRIT OF CERTIORARI

I.

The decision of the Court of Appeals presents an important question under the antitrust laws which should be reviewed at this time because:

(1) it conflicts with prior decisions of this Court holding that a manufacturer may not tamper with or affect the resale price of goods once they leave the manufacturer's dominion, and

(2) it creates a universally applicable loophole in the antitrust laws by permitting manufacturers to control the ultimate resale prices of their goods through the use of rebate plans.

Although the appeal was from the denial of a preliminary injunction, the Court of Appeals recognized at the outset that it was faced with a substantive question of law which, if resolved in plaintiff's favor, could entitle it to a final judgment on the merits. The opinion below framed the principal question presented for decision in the following terms:

> "Is Chrysler's rebate plan a price-fixing arrangement, and, thus, illegal per se under § 1 of the Sherman Act; if so plaintiff may have been entitled to final judgment on the merits." (Appendix B, p. B4)[7]

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[7] The Court of Appeals added in a footnote:

"Resolution of the price-fixing issue in a manner favorable to Checker would create another question, which we do not here decide, before a § 1 violation could be made out; whether the rebate plan is a contract, combination or conspiracy within the meaning of § 1."

We take up this issue in Point III, *infra*.

In deciding that the Chrysler rebate plan was not an illegal price fixing arrangement, the Court of Appeals failed to follow the many prior decisions of this Court (discussed more fully in Point II, *infra*) holding that any form of direct or indirect tampering with price structures or any practice which affects price levels is illegal *per se* under Section 1 of the Sherman Act.

Although it is quite clear from the face of the plan itself that the effect of the $183 factory rebate is to reduce by a fixed amount the ultimate resale price paid by one who purchases a Chrysler-built taxicab from an authorized Chrysler dealer,[8] the Court of Appeals nevertheless maintained that such a practice was not illegally tampering with a resale price. The reasons for the Court of Appeals' decision may be found in the following language in its opinion:

> "Indeed, all of the evidence indicates that the Chrysler dealers are free to sell at their own prices and that the manufacturer's rebate plan is in the nature of an advertising expedient. Contrary to appellant's contentions, the plan lends no assurance to Chrysler that the entire price cut will be passed on to its dealers' customers. Nor does the availability to Chrysler of an alternative program whereby their dealers would directly receive the price discount and the individual dealers could thereafter decide whether to pass all or part of the price reduction on to their customers prohibit Chrysler's use of the discount device to which appellant objects. All that is required by § 1 for the discount device employed by Chrysler to be valid is that the pricing independence of the individual dealer remain unimpeded. Accordingly, we find the instant scheme falls squarely within our holding in *Susser, supra.*" (Appendix B, p. B6)

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[8] *i.e.*, after a taxicab purchaser has negotiated an initial resale price with the dealer, he then gets an automatic, uniform, predetermined refund from the manufacturer, thereby establishing his true net purchase price.

As we show in Point II, *infra*, it is utterly unreasonable to assume that sophisticated commercial taxicab purchasers (many of whom are fleet owners) will permit Chrysler dealers to jack up their usual retail prices so as to allow the dealers to pocket for themselves all or part of a published and widely advertised $183 factory rebate which Chrysler expressly intended for the customers rather than the dealers.

Indeed, the Court of Appeals disregarded defendants' own admission that they decided to use a direct customer rebate instead of cutting the wholesale price to the dealers precisely because defendants wanted to be certain the entire price cut was passed on to the retail customers. As Chrysler put it, "retailers have a special interest in keeping price levels as high as possible" (Defendants' brief in the Court of Appeals, p. 35) and defendants feared that their dealers could not be trusted to pass on the entire cut if they were given sole discretion to dispose of the price reduction themselves.

As we show in Point II, *infra*, "the pricing independence of the individual dealer" did not "remain unimpeded" as postulated by the court below; on the contrary, the Chrysler rebate plan was deliberately adopted to *prevent* Chrysler dealers from competing with each other with respect to the $183 price reduction.

This is a case where a manufacturer is admittedly seeking to control, affect and tamper with the ultimate resale price of its product by giving the retail customer a direct rebate which bypasses the dealer in order to make certain the retail customer will enjoy the full benefit of the rebate. By holding such a practice legal on the illusory ground that the dealer is still free to set the initial resale price at whatever level he chooses, the Court of Appeals has created a glaring loophole in the Sherman Act.

The decision of the court below, if permitted to stand, is an open invitation to manufacturers to exercise control

over resale price levels through the use of factory rebates, thereby undermining the general prohibition against price tampering and, in particular, the policy expressed by this Court in such cases as *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 721 (1944) (holding resale price control unlawful), *Simpson* v. *Union Oil Co.*, 377 U. S. 13 (1964) (holding that a "consignment" device cannot validate otherwise unlawful resale price control) and *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365, 379 (1967), where the Court reiterated the well settled rule that

> "If the manufacturer parts with dominion over his product or transfers risk of loss to another, he may not reserve control of its destiny or the conditions of its resale."

II.

The Court of Appeals erred in holding that the Chrysler rebate plan is not illegal *per se* under Section 1 of the Sherman Act.

A. The Prior Decisions of this Court

It is, of course, axiomatic that "price fixing" is illegal *per se* under Section 1 of the Sherman Act.

In *United States* v. *McKesson & Robbins, Inc.*, 351 U. S. 305, 311 (1956), this Court made it clear that any type of price fixing, no matter how subtle or unique the means employed, is illegal *per se* and there is no "category" of price arrangements which may be "spared from application of the *per se* rule."

In its decision in *United States* v. *White Motor Co.*, 372 U. S. 253, 260 (1963), this Court reiterated that:

> "Price fixing arrangements, both vertical (*U. S.* v. *Parke, Davis & Co.*, 362 U. S. 29; *Dr. Miles Medical Co.* v. *Park & Sons*, 220 U. S. 373) and horizontal (*U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150; *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U. S. 211), have also been held to be *per se* violations of the antitrust laws; and a trial to show their nature, extent, and degree is no longer necessary."

The term "price fixing", which has become firmly entrenched in the antitrust vocabulary, may be somewhat of a misnomer. The cases hold that illegal "price fixing" may exist even though the accused arrangement does not relate to an entire price but merely to components of price structures such as discounts (see, *e.g.*, *White Motor, supra*), and may be found even though the arrangement in question does not "fix" the price but merely "affects" or "tampers" with "general price levels" or "price structures" (see, *e.g.*, *Socony, infra*).

In *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940), this Court rejected the notion that price fixing encompasses only "the mere establishment of uniform prices" (p. 222). It said that price fixing "has no such limited meaning" and emphasized that agreements directed at price are illegal "whatever machinery for price-fixing was used" (p. 222). The Court stated that:

> "Any combination which tampers with price structures is engaged in an unlawful activity." (p. 221)

This Court has also held repeatedly that where a manufacturer sells his product to a dealer, he may not enter into an agreement, express or implied, which permits the manufacturer to control or affect any facet of the dealer's resale price to his customers, unless such agreement falls within the "fair trade" exemptions to the antitrust laws which are clearly not applicable to Chrysler's efforts to *lower* the ultimate retail price paid by taxicab purchasers. *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 721 (1944); *Simpson* v. *Union Oil Co.*, 377 U. S. 13 (1964). *Cf. United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365, 368 (1967).

During the oral argument in the Court of Appeals, members of the bench inquired why a program which benefits consumers by *lowering* retail prices should be declared illegal under the Sherman Act. This Court has, of course, held on a number of occasions that price fixing is illegal *per se*, whether its effect is "to raise or to decrease prices". *United States* v. *McKesson & Robbins, Inc.*, 351 U. S. 305, 310 (1956). In the recent case of *Albrecht* v. *Herald Co.*, 390 U. S. 145 (1968), the Court struck down a combination purporting to give a newspaper's retail customers the benefit of a maximum resale price to be charged by the newspaper's dealers.

The case at bar is a classic illustration of why the courts consider maximum price fixing just as repugnant as

minimum price fixing. Experience has taught that maximum price fixing may result in the destruction of competition and leave the price fixers in a dominant market position in which they can then raise prices at will. In some industries, of course, new competitors will flock in as soon as prices are raised again. But this is obviously not true of the automobile industry where it is practically impossible for a newcomer to gain a foothold. (*Cf.*, Kaiser-Frazer, Tucker, *et al.*)

Even though the operators of taxicabs are presently getting a $183 price break from Chrysler, one of their formerly major sources of supply is being driven to the wall as a result. If Checker should follow in the footsteps of the many other small automobile manufacturers who have been forced out of business, this will leave the taxicab field to the same "Big Three" who now dominate the pleasure car field. It may then be only a question of time before the price levels in the taxicab industry are right back to where they were before Chrysler initiated its rebate plan, if not higher.

B. The Decision of the Court of Appeals

After paying lip service to the many decisions of this Court condemning every form of direct or indirect tampering with any aspect or component of a price or resale price, the court below held that the Chrysler rebate plan, which provides for a uniform resale price cut, is not illegal *per se*.

1. *The Court of Appeals' reliance on labels and disregard of plaintiff's losses*

At the outset, the Court of Appeals adopted the language of the District Judge who had referred to the rebate plan as a "promotional sales 'gimmick'" (Appendix B, p. B6) adding in its own words that the "rebate plan is in the nature of an advertising expedient" (Appendix B, p. B6). Such labels are, of course, no substitute for legal and eco-

nomic analysis. If the rebate plan is indeed a device by which defendants tamper with or affect the resale price of their product, as plaintiff contends, then the plan should be declared illegal even though Chrysler may only regard it as a harmless "advertising expedient" or "promotional gimmick".

In adopting these casual labels, the courts below appeared to be singularly insensitive to the fact that while the rebate plan might be nothing more than a gimmick from Chrysler's standpoint (since it involved only a miniscule fraction of Chrysler's annual vehicle sales of 1,400,000), it has had and continues to have a devastating impact on plaintiff Checker, whose total annual sales of taxicabs and passengers cars are only a few thousand units. As this Court stated in *Klor's Inc.* v. *Broadway-Hale,* 359 U.S. 207, 213 (1950), a violation of Section 1 of the Sherman Act is

> ". . . not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy."

The Court of Appeals also stated that Judge Mansfield "considered that Checker's loss of dominion over the 1,600 of the 11,000 taxicab medallions it previously controlled in New York City and the unfriendly relationship between Checker's president, Morris Markin, and the city's fleet owners were more probable causes of Checker's declining sales in New York City than any possible anticompetitive effect created by Chrysler's rebate plan." (Appendix B, p. B8).

To begin with, it should be pointed out that Judge Mansfield expressed no such view at all but merely *listed* these factors as issues *advanced by Chrysler* which would have to be tried if the rebate plan was not found to be illegal *per se* (Appendix A, pp. A13-14). Moreover, it is well settled that even if a trial should establish that the

Chrysler rebate plan was not the sole cause of Checker's losses, this would not absolve Chrysler of liability. As was said by the court in *Switzer Brothers, Inc.* v. *Locklin*, 297 F. 2d 39, 47 (7th Cir. 1961), in rejecting an argument that plaintiff-appellee's loss of sales had resulted from several factors:

> "[W]e think appellants' contention rests upon a misconstruction of the law which would make injury compensable under the antitrust laws only if the unlawful conduct found to exist stood alone as the causation of the injury. A violation of the antitrust laws is answerable in treble damages for injury to another by the unlawful act even though other factors may have contributed to the injury. *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251, 264-265, 66 S. Ct. 574, 90 L. Ed. 652; *Story Parchment Co.* v. *Paterson Parchment Co.*, 282 U. S. 555, 566, 51 S. Ct. 248, 75 L. Ed. 544 . . ."

Finally, as this Court stated in *Northern Pacific Railway Co.* v. *United States*, 356 U. S. 1, 5 (1958), in affirming a grant of summary judgment in favor of plaintiff:

> "(T)here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore *illegal without elaborate inquiry as to the precise harm they have caused or the business excuse of their use.* This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruit-

less when undertaken. Among the practices which the courts heretofore deemed to be unlawful in and of themselves are price fixing, *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 210 . . ." (Emphasis added)

2. *The Court of Appeals' conclusion that there was no impairment of competition*

As previously noted, the main thrust of the opinion below is to be found in the following language:

> "Indeed, all of the evidence indicates that the Chrysler dealers are free to sell at their own prices and that the manufacturer's rebate plan is in the nature of an advertising expedient. Contrary to appellant's contentions, the plan lends no assurance to Chrysler that the entire price cut will be passed on to its dealers' customers. Nor does the availability to Chrysler of an alternative program whereby their dealers would directly receive the price discount and the individual dealers could thereafter decide whether to pass all or part of the price reduction on to their customers prohibit Chrysler's use of the discount device to which appellant objects. All that is required by §1 for the discount device employed by Chrysler to be valid is that the pricing independence of the individual dealer remain unimpeded. Accordingly, we find the instant scheme falls squarely within our holding in *Susser, supra.*" (Appendix B, p. B6)

It is plaintiff's contention that the rebate plan has the purpose and effect of inhibiting and impairing competition on either or both of two levels: (1) among Chrysler dealers with respect to the destiny of the $183 price cut, and (2) between Chrysler and Checker in the sale of taxicabs.

It requires no extensive analysis to demonstrate that the effect of the rebate plan is to reduce whatever initial

resale price may be negotiated by a dealer and his taxicab customer by an automatic $183.

The rebate plan does not define or fix the entire ultimate retail price to be paid by retail customers. As shown at pages 13-14, *supra,* such proof is not required by the cases. However, the Chrysler rebate plan does affect the ultimate price to the consumer to the extent of determining that such price shall be the price negotiated between the dealer and the customer *less* $183.

The District Court conceded in its opinion, in language quoted with approval by the Court of Appeals (Appendix B, p. B6) that:

> "The plan does not give *as much* practical pricing flexibility to the Chrysler dealer as would a direct $183 price reduction in the wholesale price, since the customer, rather than the dealer, is automatically entitled to the rebate upon purchase of a Chrysler taxicab, *whereas if Chrysler reduced the price to its dealers by $183, bargaining between each dealer and his customer might ensue to determine how much of the reduction, if any, would be passed along to the retail customer.*" (Emphasis supplied.)

but added:

> "However, this is an illusory distinction, since the dealer has the freedom to increase his retail price to offset the $183 rebate.". (Appendix B, p. B6)

We submit that it is the District Court's own attempted distinction, as adopted by the Court of Appeals, which is illusory. Here is a widely advertised and widely promoted rebate plan, whose contents are made known to purchasers and prospective purchasers of Chrysler-built taxicabs, telling them that they are entitled to a direct factory rebate of $183 per vehicle. As recognized by the District Court, each Chrysler dealer must compete not only against the

dealers of other manufacturers but also against other Chrysler dealers (Appendix A, p. A9). In the face of all this, is it realistic to suppose that the Chrysler dealer can simply capture all or part of the $183 rebate granted to his customer by *increasing* his normal retail price to offset it?

Even if the dealers negotiate varying prices with their respective taxicab customers, the fact remains that in each instance both the dealer and the customer know that once a selling price has been agreed upon, there will be a further automatic and non-negotiable reduction of $183 per vehicle. To assume that a customer who knows about the $183 rebate will submit to the absorption of all or part of the rebate by the dealer by agreeing to pay him a correspondingly higher retail price is to ignore the realities of the market place.

The very purpose of the rebate plan was to *prevent* a Chrysler dealer from pocketing all or part of the $183 price reduction. Chrysler might have cut the wholesale price on taxicabs to its dealers and then let the dealers determine for themselves how much of the price reduction, if any, to pass along to their customers. But Chrysler has admitted it did not want to give its dealers that kind of flexibility (Defendants' brief in the Court of Appeals, p. 35). It wanted to make certain that the entire $183 price cut was passed on to its dealers' customers and accordingly devised its elaborate rebate program which was designed to control the dealer's resale price at least to that extent and to remove the $183 price reduction from the area of dealer competition.

Chrysler's deliberate tampering with a portion of the resale price paid by the retail customers should not be disregarded merely because there is a theoretical possibility (certainly not a probability) that some dealers might attempt to undermine the purpose of the plan by raising the retail price to the customer. Chrysler should be bound by

the manifest objective of its own plan, which was clearly designed not to give a windfall profit to the dealers but rather to reduce each negotiated retail price by an automatic $183 per vehicle.

In order to uphold the validity of the plan, the courts below had to conclude, in effect, that *no* Chrysler dealer would ever carry out the spirit and intent of the plan by permitting a customer to obtain the full benefit of the $183 rebate. This is an unwarranted conclusion, wholly unsupported and indeed refuted by the evidence in the record.[9]

The Court of Appeals' reliance on its own decision in *Susser* v. *Carvel Corporation*, 332 F. 2d 505, 510 (2d Cir. 1964), *cert. granted*, 379 U. S. 885 (1964), *cert. dismissed as improvidently granted*, 381 U. S. 125 (1965), was entirely misplaced.

Susser held that an ice cream manufacturer's practice of recommending a retail price to its franchised dealers was lawful where "the franchise provisions explicitly reserved to the individual dealer the right to set whatever price he desired" and where no attempts to enforce the price structure were shown.

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[9] Proof that Chrysler's dealers have not undermined this policy by raising their retail prices can be found in the affidavit of J. R. Longon, a Vice President of Chrysler Motors, who states:

> "The Fleet Value Program has materially aided Chrysler in competing against Ford Motor Company ('Ford') and General Motors Corporation ('GM'), both of whom I am told are offering cash inducements exceeding those offered by Chrysler Motors." (122a)

If Chrysler's dealers were indeed pocketing all or a portion of the $183 rebate, as suggested by the District Court, then the rebate could hardly be as effective against Ford and GM as Mr. Longon claims it is.

It should be noted that the District Court found that Chrysler's rebate plan antedated Ford's and GM's alleged rebate arrangements (Appendix A, p. A21).

The case at bar, however, involves a deliberate plan by Chrysler to bypass its dealers' independent pricing discretion and to affect directly the ultimate resale price paid by purchasers of Chrysler-built taxicabs. This conduct falls squarely within the very language of the *Susser* opinion, which said:

> "Even in the absence of express contractual provisions which evidence an unlawful scheme, a charge of unlawful price-fixing may be substantiated by proof of conduct by which the seller or licensor effectively maintains control of the ultimate retail price at which a product is sold." (332 F. 2d at p. 510.)

The phrase "ultimate retail price", as used in the *Susser* opinion, must mean the price actually paid by the retail customer. In the case at bar, the price actually paid by customer is the retail price negotiated by the customer and the dealer minus the $183 rebate which is then given to the customer by Chrysler. The manufacturer thereby affects and maintains control over the ultimate price paid by the customer even though the manufacturer parted with dominion over his product when he sold the vehicle to the dealer.

In *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365, 379 (1967), this Court made it clear that it is illegal for a manufacturer to seek to control the conditions of resale once he "parts with dominion over his product".

And in *Simpson* v. *Union Oil Co.*, 377 U. S. 13 (1964), this Court held that a manufacturer had no right to control the resale price even of goods delivered to a dealer under a consignment agreement which retained title in the manufacturer. The Court said, at page 24:

> "To allow Union Oil to achieve price fixing in this vast distribution system through this 'consignment' device would be to make legality for antitrust purposes turn on clever draftsmanship. We refuse to let a

matter so vital to a competitive system rest on such easy manipulation."

If resale price control is illegal even under a consignment contract where the manufacturer retains title, then a manufacturer who parts with title and sells his product to a dealer should *a fortiori* not be permitted to tamper with the resale price paid by the dealer's retail customers through the use of a clever device such as the Chrysler rebate plan.

Not only does the Chrysler rebate plan have the purpose and effect of restraining competition among Chrysler dealers with respect to the $183 price reduction. The plan also had and continues to have the purpose and effect of eliminating Checker as an effective competitor of Chrysler in the taxicab field, particularly in New York City. When the plan was introduced, Chrysler was determined to increase its taxicab sales in New York City in order to have a basis for a nationwide advertising campaign extolling the quality and durability of Chrysler products (69a-70a, 76a-77a). Its way of achieving a dominant position in the New York City taxicab market was to offer retail customers a substantial price cut and make certain that this price reduction wound up in the pockets of the customers rather than the dealers. The Chrysler rebate plan was the device employed to accomplish this purpose.

In short, even if the Court of Appeals was correct in holding that it is not enough for a plaintiff to show the existence of price tampering in order to establish a *per se* violation of the Sherman Act but that a plaintiff also has the burden of proving that the price tampering has the effect of restraining competition, it is submitted that plaintiff Checker has made the requisite showing that the Chrysler rebate device has impaired competition on either or both of two levels.

III.

The rebate plan is a contract, combination or conspiracy between defendants and their dealers and between the two defendants themselves.

The District Court's opinion did not take up the question of whether or not the rebate plan is a contract, combination or conspiracy within the meaning of Section 1 of the Sherman Act and the Court of Appeals left this question open.

It is submitted, however, that it is amply clear from the record that the rebate plan is a contract, combination or conspiracy on either or both of two levels:

(1) between Chrysler and the independent dealers who implement the plan and

(2) between Chrysler Corporation and its wholly-owned sales subsidiary, Chrysler Motors Corporation.

The record below shows that Chrysler's rebate plan is operated with the concurrence and active participation of its dealers.

Plaintiff is not required to establish that the rebate plan was originally conceived or formally agreed upon by Chrysler acting in concert with its dealers. We are required only to show a common purpose or knowing participation in the plan by two or more entities or persons.

As this Court stated in *Interstate Circuit* v. *United States*, 306 U. S. 208, 227 (1939):

> "It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. [Citing cases.] Acceptance by competitors, without previous agreement, of an invitation to participate in a plan,

> the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act. [Citing cases.]"

In *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 723 (1944), this Court stated:

> "Whether this conspiracy and combination was achieved by agreement or by acquiescence of the wholesalers coupled with assistance in effectuating its purpose is immaterial."

To the same effect see *United States* v. *Parke, Davis & Co.*, 362 U. S. 29, 43 (1960); *Eastern States Lumber Association* v. *United States*, 234 U. S. 600, 612 (1913).

The Chrysler program provides on its face that the rebate will be paid only on taxicabs

> "sold at retail and delivered to Qualified Fleet Customers in the Fifty (50) United States and the District of Columbia *by an authorized Chrysler Motors Corporation dealer.* . . ." (Emphasis added.) (Appendix D.)

Thus, the only time the rebate plan can be implemented is when an authorized Chrysler dealer sells to a qualified customer. This alone demonstrates that the plan is operated through Chrysler's dealers. Chrysler could have provided that the rebate should be paid on new Chrysler-built taxicabs purchased from any source. Defendants required, however, that their price reduction plan could be implemented only through authorized Chrysler dealers. They should not be permitted to escape the consequences of this dealer participation by asserting that the customers, after learning of the rebate from the dealers, mail their applications directly to Chrysler Motors in Detroit and receive their rebate checks directly from the company.

The record also shows that this rebate plan is used as a sales tool by the Chrysler dealers and is advertised by

them to the public. See, *e.g.*, the advertisement of Future Motors, Inc. (a leading Chrysler taxicab dealer in New York City) which states:

> "Good News for Owner-Drivers. Chrysler Corporation's Fleet Rebate of $183.00 now applies to one-car purchases by the owner-driver! Think about that new taxi now!" (83a)

In short, it is clear that Chrysler's rebate plan was put into effect and is being administered and promoted with the active consent and cooperation of Chrysler's dealers. This is sufficient, under the prior decisions of this Court, to establish the existence of a "contract, combination . . . or conspiracy" under Section 1 of the Sherman Act.

The record also shows that the plan is being employed with the concurrence of defendant Chrysler Corporation and its wholly-owned sales subsidiary, defendant Chrysler Motors Corporation. The plan states on its face that it applies to vehicles built by Chrysler Corporation with the rebate payments to be made by Chrysler Motors Corporation (175a). This is consistent with the affidavit of J. R. Longon, a Vice President of Chrysler Motors Corporation, who explains that:

> "Chrysler [Corporation] manufactures all Chrysler-built automobiles and sells most of its output to its wholly-owned sales subsidiary, Chrysler Motors Corporation." (120a)

In its recent decision in *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134 (1968), this Court held that International Parts Corp. had conspired with its wholly-owned sales subsidiary, Midas, Inc. Although the parent and its subsidiary were not in competition with each other and the activities in question were implemented by the subsidiary, this Court decided that a marketing plan carried out by a wholly-owned sales subsidiary necessarily

involved the concurrence of its parent corporation and that this was sufficient to satisfy the requirements of Section 1 of the Sherman Act. The Court held that where two parts of a single business entity

> "availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities." 392 U. S. at pp. 141-142.

This holding should be equally applicable to the Chrysler rebate plan. The Chrysler organization has set up two separate corporate entities to manufacture and market its vehicles. Since Chrysler derives the benefits flowing from the creation of two separate corporations, it must also accept the burdens, one of which is vulnerability under Section 1 of the Sherman Act.

Accordingly, if this Court should hold that the rebate plan is a price fixing device, then the requisite "contract, combination or conspiracy" are clearly present, the plan should be declared illegal *per se* under Section 1 of the Sherman Act, and Checker should be given the injunctive relief it seeks.

CONCLUSION

For the reasons stated, petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the United States District Court for the Southern District of New York, dated March 29, 1968.

(1840) MANSFIELD, D.J.

In this private antitrust suit for treble damages and injunctive relief pursuant to §§ 4 and 16 of the Clayton Act (15 U.S.C. §§ 15 and 26), plaintiff, Checker Motors Corration (Checker), moves for partial summary judgment against defendants (1841) Chrysler Corporation and Chrysler Motors Corporation (collectively referred to as "Chrysler"*), or, in the alternative, for preliminary injunctive relief. For the reasons set out in the decision, the motion is denied in all respects.

Since 1922 Checker, a New Jersey corporation with its principal place of business in Kalamazoo, Michigan, has been engaged, among other activities, in the production and sale of "purpose-built" taxicabs, i.e., automobiles designed and engineered for use as taxicabs. In producing such vehicles it has incorporated into chassis and bodies of its own manufacture engines, axles, transmissions and other parts purchased from independent suppliers.** Checker sells its taxicabs through sales offices in various cities of the United States, principally New York, Boston, Chicago and Detroit. Prior to 1963 New York City provided one of its major markets.***

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* Chrysler Corporation manufactures automobiles that are sold by it to Chrysler Motors, which in turn sells the cars to authorized dealers throughout the country.

** Defendants' contention that Checker is an "assembler," rather than a primary "manufacturer," of automobiles, does not appear to have any legal significance in the disposition of the present motion, it being undisputed that the parties compete for ultimate sale of their respective products to taxicab operators. Furthermore, it appears that all automobile manufacturers purchase some components from independent suppliers.

*** Markin Aff., April 12, 1967; Def's Ex. B to Ehrenbard Aff., Oct. 24, 1967, pp. 14-15, indicating location of sales office and taxi subsidiary in New York; *United States* v. *Yellow Cab Co.*, 80 F. Supp. 936, 940 (N. D. Ill. 1948), affd., 338 U. S. 338 (1949); Def's Ex. J; Plf's Reply Memo, p. 8.

(1842) Incorporated in Delaware, Chrysler is engaged in the business of manufacturing and selling automobiles, automobile accessories and parts. As one of the three major automobile colossi, Chrysler, in 1966, reported $5.6 billion in gross sales and had net earnings in the amount of $189.2 million. Chrysler's vehicles are sold in various markets, including the passenger car and taxicab markets.

Chrysler-made taxis and passenger cars are essentially the same, with a series of differences designed to satisfy, in the case of the taxicabs, the operator's need for continuous heavy duty, short-trip, stop-and-go, low fuel usage, and, in the case of the passenger car, the purchaser's desire for more comfortable riding, aesthetic appearance, quick get-away, and convenience. For example, the Chrysler 1965 Dodge Coronet model taxicab has a replaceable oil filter element, stiffer shock absorbers, springs and suspension system, special brake lining, wider wheel rims, heavier capacity battery, special lights, and special carburetor, which are features not found on the passenger car. In addition, the paint and seat-cover material of the passenger car are more stylish than those of the taxi counterpart, and the passenger car usually contains more chrome. The fundamental elements of both cars, however, including the frame and engine, are essentially the same.

(1843) Chrysler distributes its vehicles to the public via a nationwide system of independent franchised dealers. In promoting the sale of its taxis and passenger cars to the consuming public, Chrysler, like other large automobile manufacturers, engages in extensive advertising campaigns. Although Chrysler suggests a retail price for its vehicles each dealer, upon purchasing automobiles from it, assumes the risk of loss, and independently determines the retail price of automobiles purchased by it from Chrysler for resale.

In 1962, in order to promote the sale of its taxicabs, Chrysler instituted the "Commercial Fleet Value Program" ("Rebate Plan" herein), under which, throughout

the United States, purchasers of two or more taxicabs from Chrysler-authorized qualified dealers could, upon completing a form and returning it to Chrysler, receive a rebate of up to $200 per taxicab from the manufacturer. In 1966 and 1967, the plan was altered to include purchasers of a single taxicab and the rebate was set at $183 per vehicle. Chrysler dealers have advertised the program, although the accounting and payments have been handled by Chrysler.

The present treble damage action was commenced in 1964. Checker's complaint alleges a combination and conspiracy between Chrysler, its subsidiaries, dealers and others, beginning in 1960, to restrain trade in the manufacture and sale of taxicabs by (1844) eliminating Checker as a competitor, excluding it from the New York City and other markets, and otherwise injure its business, and to monopolize such trade and commerce. More specifically it is alleged that Chrysler, after being advised that Checker proposed to increase its production and sales from 7,000 to 24,000 vehicles per annum, undertook to supply Checker's requirements of components for use in Checker taxicabs, private passenger automobiles and other vehicles, and to sell Checker duplicate tools, discs and fixtures at an agreed-upon low price arrangement, inducing Checker, in reliance upon such commitments, to commence re-engineering its automobile chassis and bodies for adaptation to products manufactured by Chrysler, and to construct a large number of prototype vehicles which were subjected to extensive experimental testing; that in the meantime, Chrysler in bad faith delayed preparation of a formal agreement, postponed performance of its undertakings, and proceeded to solicit Checker's taxicab clientele and to disseminate reports that Checker proposed to utilize Chrysler's motor in the manufacture of Checker taxis, thereby giving Chrysler an unfair competitive advantage and causing a substantial loss of momentum in Checker's sales and a prolonged disruption of its production.

The complaint further alleges that Chrysler sold private automobiles equipped as "taxicabs" at "unlawful, low and discriminatory prices" financed out of profits from private passenger (1845) sales, and increased its taxicab sales through the Rebate Plan

> "pursuant to which [Chrysler] and [its] co-conspirators unlawfully discriminated in prices between purchasers of defendants' passenger automobiles equipped with the so-called 'taxicab package' and purchasers of said automobiles not so equipped." (Complaint Par. 14(f)(i))

It was alleged that even in the absence of the Rebate Plan

> "the suggested retail list prices of defendants' passenger automobiles sold for use as taxicabs were and are generally lower than the suggested retail list prices of automobiles of the identical make and model sold to the general public for use as private passenger cars, notwithstanding the fact that the automobiles sold as taxicabs include more costly extra items known as the 'taxicab package'." (Complaint Par. 14(f)(ii))

The rebate accorded to purchasers of Chrysler's automobiles sold for use as taxicabs, it is alleged, was not supported by any cost justification, the program allegedly being motivated by

> "defendants' recognition that the greatest volume of taxicab sales usually takes place in New York City, and that domination by defendants of the New York City taxicab market, in addition to eliminating plaintiff as a substantial competitor, would be a valuable lever and selling point by which defendants could increase their share of the passenger automobile market throughout the United States. The importance attached by defendants to dominating the New York City taxicab market as a means of furthering the sales of

various of its passenger automobiles is shown by the extensive national advertising campaign defendants have constructed around its New York City taxicab sales. Said advertising campaign falsely and fraudulently represents to the public at large that many of defendants' passenger cars sold for use as taxicabs are 'taxi-labs', whose performance can be meaningfully compared to defendants' private passenger car performance. Such advertising (1846) misleadingly omits any mention of the special, heavy duty 'taxicab package' installed in the passenger cars equipped for use as taxicabs, which completely invalidates the comparison defendants purpose to make between their passenger cars equipped for use as taxicabs and those not so equipped." (Complaint Par. 14(f)(vii))

Chrysler's conduct is claimed to have substantially lessened competition in the line of commerce consisting of the manufacturer and sale in interstate commerce of automobiles, including taxicabs. As a result of Chrysler's activities, Checker seeks $45 million in damages and an injunction permanently enjoining Chrysler, its servants, agents, employees and others in privity with them, from conspiring to destroy plaintiff's business by unlawful means.

On the present motion, only the legality of the Rebate Plan is in issue. Checker asserts that the arrangement as employed in New York City amounts to (1) a *per se* unlawful price fixing contract, combination, or conspiracy between Chrysler and its dealers in violation of § 1 of the Sherman Act, 15 U.S.C.A. § 1; and (2) a discriminatory pricing arrangement in violation of § 2(a) of the Robinson-Patman Act, 15 U.S.C.A. § 13(a). As an alternative to partial summary judgment, Checker seeks a preliminary injunction against Chrysler's continuing the Rebate Plan during the pendency of this litigation.

Chrysler first contends that the motion should be denied (1847) because it is predicated on claims different from those alleged in the complaint. Although the complaint's emphasis is almost entirely on Chrysler's alleged discrimination in pricing, Paragraph 14(e) does allege that its taxicab sales have been made at "*unlawful*, low and discriminatory prices," which is probably sufficient to support a Sherman Act attack upon the Rebate Plan in this age of "notice" pleading. However, in view of this Court's denial of plaintiff's motion for substantive reasons, it becomes unnecessary to rest the decision on such a technical ground. With respect to the Robinson-Patman claim, there is no merit in defendant's contention. The complaint set forth a § 2(a) price discrimination primary line injury claim with sufficient particularity to put Chrysler on notice that Checker is allegedly aggrieved by reason of the rebate given to taxi purchasers. See Complaint Par. 14(f)(i), (vii).

Equally meritless is Chrysler's contention that since the complaint was filed in 1964 it cannot be used to attack Chrysler's Rebate Plan in effect in subsequent years. Checker's complaint alleges a continuing course of illegal conduct on Chrysler's part, against which injunctive relief is sought. Complaint Pars. 16, 17.

Defendants next assert that Rule 56, F.R.C.P., does not authorize a motion for partial summary judgment of the kind (1848) before the Court, because plaintiff is not entitled to split up the various wrongs asserted in a single count, and move with respect to one and not with respect to the others, i.e., the alleged unlawful activity in causing plaintiff to alter its production methods. However, Rule 56(a) authorizes a claimant to move for summary judgment in his favor upon all "*or any part*" thereof. In *White Motor Co.* v. *United States*, 372 U. S. 253, 264 (1963), the Supreme Court allowed such fragmentation by granting summary judgment with respect to the price fixing claim, and denying the motion with respect to the legality of terri-

torial and customer limitations contained in White's franchise contracts. At least in a complex case involving a series of separate transactions, as distinguished from one involving part of a single transaction or a portion of damages claimed, plaintiff's motion for partial summary judgment ought not be dismissed on the hyper-technical basis urged by Chrysler, since plaintiff's motion is not only designed to reach a quick judgment that is in the interest of the parties, but also undertakes to prevent the needless waste of judicial resources where it appears that the particular claim under judicial scrutiny involves no genuine issue of material fact. And this is the very intent of Rule 56.

The § 1 Sherman Act, Claim

Having disposed of the preliminary sparring, the (1849) legality of the Rebate Plan under § 1 of the Sherman Act, 15 U.S.C.A. § 1,* comes into focus. Plaintiff asserts that the plan is a *per se* price fixing agreement between Chrysler and its dealers and therefore conclusively unreasonable, irrespective of purpose, reasonableness or competitive effect. *United States* v. *Sealy, Inc.*, 388 U. S. 350, 355 (1967); *United States* v. *General Motors*, 384 U. S. 127, 147 (1966); *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 220-23 (1940); *United States* v. *Trenton Potteries Co.*, 273 U. S. 392 (1927).

Regardless of the absence of agreement as to a specific or uniform price, a wide variety of horizontal and vertical arrangements have been classified as price-fixing agreements and therefore condemned as unlawful *per se*, e.g., *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211 (1951) (agreement on maximum resale prices); *United States* v. *United Liquors Corp.*, 149 F. Supp. 609

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* "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: . . .".

(W. D. Tenn. 1956), *aff'd. per curiam*, 352 U. S. 991 (1957) (agreement on elimination of quantity discounts); *Plymouth Dealers Assn.* v. *United States*, 279 F. 2d 128 (9th Cir. 1960) (agreements on starting price for bargaining and trade-in allowances); *United States* v. *Gasoline Retailers Assn.*, 285 F. 2d 688 (7th Cir. 1961) (agreement not to give trading stamps); *United States* v. *McKesson & (1850) Robbins, Inc.*, 351 U. S. 305 (1956) (manufacturer's requirement that wholesaler maintain resale price levels determined by manufacturer). However, an essential element is the competitor's surrender, express or implied, of some measure of pricing discretion. The evil of price-fixing agreements is that they

> "cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." (*Kiefer-Stewart Co.* v. *Seagram & Sons, Inc.*, 340 U. S. 211, 213 (1951))

Conduct or agreements not restricting a competitor's pricing independence, on the other hand, falls short of illegal price fixing. See Turner, The Definition of Agreement under thee Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv. L. Rev. 655, 687 (1962). For instance, in *Susser* v. *Carvel Corp.*, 322 F. 2d 505 (2d Cir.), *cert. granted*, 379 U. S. 885 (1964), *cert. dismissed as improvidently granted*, 381 U. S. 125 (1965), an ice cream manufacturer and its franchised dealers were held not to have engaged in an unlawful price fixing scheme where the manufacturer had merely recommended a retail price to the dealers, in the absence of the manufacturer's endeavoring to enforce the price structure at the retail level. In affirming the legality of the arrangement, Chief Judge Lumbard emphasized that "the franchise provisions explicitly reserved to the individual dealer the right to set whatever price he desired." 332 F. 2d at 510.

On its face Chrysler's Rebate Plan does not curtail the (1851) dealer's pricing discretion. Each dealer is free (1)

to raise retail taxicab prices, thus nullifying the effect of the rebate; (2) to keep his prices constant, and thus render Chrysler taxicab price competitive vis-a-vis General Motors, Ford, Checker and other automobile makers who grant similar rebates; or (3) to lower his prices still further in competition against both Chrysler and non-Chrysler dealers alike. No evidence has been offered to the effect that the $183 rebate has even the slightest tendency to restrict in any way the dealer's independent decision and determination as to the retail sales price quoted by him to customers for Chrysler taxicabs. The most that appears from the record before us is that the plan manifests to the taxicab purchaser a desire on Chrysler's part to promote competitive sale of its taxis, at least to the extent of giving the appearance of a price advantage to the customer in the form of a $183 rebate. Possibly the practice acts as a psychological inducement to the customer that cannot be realized through a direct price reduction to the dealer in the identical amount which would, as a practical matter, enable the dealer in his discretion to reduce his price accordingly. Certainly the marketplace is full of similar manufacturer-originated promotional sales "gimmicks," such as "free goods" in the grocery and drug trades, coupons entitling the holder to cash or discounts, and the like, which do not run afoul of the Sherman Act in the (1852) absence of a showing of impropriety. The plan does not give as much practical pricing flexibility to the Chrysler dealer as would a direct $183 price reduction in the wholesale price, since the customer, rather than the dealer, is automatically entitled to the rebate upon purchase of a Chrysler taxicab, whereas if Chrysler reduced the price to its dealers by $183, bargaining between each dealer and his customer might ensue to determine how much of the reduction, if any, would be passed along to the retail customer. However, this is an illusory distinction, since the dealer has the freedom to increase his retail price to offset the $133 rebate.

Thus there is a failure to show any provision of the plan, or any facts, indicating that the plan would tend to affect the exercise of competitive pricing discretion, or to affect or tamper with the range, level, scale, or amount of the price paid for Chrysler taxicabs, such as appears in price-fixing or distribution agreements that have been struck down as unreasonable without more. *United States* v. *McKesson & Robbins, Inc.*, 351 U. S. 305 (1956); *United States* v. *Univis Lens Co.*, 316 U. S. 241 (1941); *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940). In the absence of proof that the Rebate Plan has a tendency to restrict the dealer's pricing independence, or has some pricing effect, it amounts to nothing more than a promotional device which cannot be labelled illegal *per se*.

(1853) Having determined that it is inappropriate to condemn the plan as a *per se* unlawful price fixing arrangement on this motion for summary judgment, the question remains whether the Rebate Plan poses such a pernicious effect on competition that it must be condemned as violating the rule of reason. *White Motor Co.* v. *United States*, 372 U. S. 253, 263 (1963); *Standard Oil Co.* v. *United States*, 221 U. S. 1 (1911). Compare, Areeda, Antitrust Analysis ¶¶ 347, 348 (1967). The legality of a vertical rebate plan under § 1 of the Sherman Act, like that of the territorial and customer restrictions in the franchise agreement before the Supreme Court in *White Motor Co., supra*, can be determined only after an inquiry into facts peculiar to the taxicab business for the purpose of determining what effect, if any, the program has had, or is likely to have, upon competition and dealer price conduct, and whether under all the circumstances it must be condemned as unreasonable. As the Supreme Court stated in *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238 (1918):

> "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby

promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be (1854) attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."

Here the moving papers fail to offer any proof to the effect that the Rebate Plan has had, or is likely to have, an adverse effect on competition in the sale of taxicabs.

Checker's claim that it has lost taxicab sales in New York City to Chrysler as a result of the latter's Rebate Plan appears to be supported by the following schedule of taxicab registration:

NEW YORK CITY
TAXICAB REGISTRATIONS

Date	*Checker*	*Ford*	*(Chrysler) Dodge*	*Chevrolet*	*Studebaker*	*Plymouth*	*Misc.*	*Total*
Dec. 1961	3,603	4,176	1,813	729	791	495	116	11,723
June 1962	3,872	3,400	2,026	914	1,080	343	95	11,730
Dec. 1962	4,056	2,938	2,376	953	1,092	315	71	11,737
June 1963	3,795	2,831	2,921	965	981	203	51	11,747
Dec. 1963	3,405	3,093	3,634	865	546	161	45	11,749
June 1964	2,301	3,186	4,834	864	424	106	37	11,752
Dec. 1964	1,776	3,192	5,587	840	246	78	34	11,753
April 1965	1,607	3,089	5,957	821	178	69	32	11,753
Dec. 1965	1,046	3,046	6,867	691	30	48	25	11,753
Aug. 1966	885	2,937	7,261	587	20	53	28	11,771

(1855) Registration figures may be a misleading indicator of sales, however, for the reason that they include both new and used taxicabs in service at any given time. A more accurate source would probably be the actual sales of taxicabs during the relevant period. Sales figures made available to the Court for New York City for the period 1964-1967 are as follows:

New York City Taxicab Sales

	1964 Model		*1965 Model*		*1966 Model*		*1967 Model*	
	Unit	*Share*	*Unit*	*Share*	*Unit*	*Share*	*Unit*	*Share*
Checker	415	6.6%	200	3.1%	268	4.7%	269	4.7%
Chrysler	3,467	55.2%	4,221	66.4%	3,357	60.1%	2,648	46.6%
Ford	1,831	29.2%	1,459	23.0%	1,958	34.8%	1,646	28.9%
Gen Mts.	375	6.0%	478	7.5%	20	0.4%	1,124	19.8%

The above figures, however, fail to reflect a sharp drop in 1964 sales of Checker cabs into New York City as compared with earlier years, allegedly as a result of Chrysler's introduction of its Rebate Plan in 1962. Notwithstanding Checker's sharply declining share of the New York registrations, however, according to its own figures its nationwide sales have not declined quite as noticeably during the relevant period:

(1856) CHECKER MOTORS CORPORATION
Annual Taxicab Sales

	United States	*New York City*
1960	5,943	1,385
1961	4,219	1,667
1962	5,603	1,666
1963	4,969	1,221
1964	3,967	247
1965	4,050	240

Although Checker claims that the Rebate Plan has been a cause in the decline in Checker's sales, Chrysler sets out other reasons for its difficulty. First, in New York City a taxicab owner is required to have a medallion to operate a taxi vehicle. Prior to 1953 National Transportation Co. (National), a Checker subsidiary, controlled in excess of 1,600 of the total of approximately 11,000 taxicab medallions, or franchises, authorized by the City of New York. Chrysler contends that beginning in that year, under pressure from Government antitrust litigation, National began to systematically sell its medallions to various New York City taxicab fleet operators. However, as a condition to the sale of its medallions, Checker would require the medallion purchaser to replace its entire fleet for the year with its taxicabs. By 1964, Checker had parted with the last of its 1,600 medallions with a resulting loss of this weapon for maintenance of its sales of taxicabs in New York. Moreover, Chrysler points to facts indicating that Checker's president, Morris Markin, has contributed to the (1857) company's loss of New York City sales by antagonizing that city's taxicab fleet owners over the years through public statements in favor of higher wages for taxi drivers and against increases in cab fares.

Even if it is assumed that the plan resulted in Chrysler dealers taking away sales from Checker, it is doubtful whether this is a permissible consideration, in the absence of a showing of predatory tactics, such as sales below cost or a scheme to squeeze Checker out of the market in order to destroy its competition and have it to themselves, since the purpose of the Sherman Act is to protect competition, not competitors. *Ben Hur Coal Co.* v. *Wells,* 242 F. 2d 481, 486 (10th Cir.), *cert. denied,* 354 U. S. 910 (1957). See *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 220-21 (1940). The inevitable result of lawful price competition, particularly in an inelastic market with a fixed ceiling on the number of units that can be sold (such as New York City, which limits taxicabs to approximately

12,000), is that some sellers are going to take away business from others, unless all sell the identical product at the same price. Thus, if Chrysler were to have reduced its wholesale prices by $183, a move the legality of which would probably not be successfully challengeable, the effect on plaintiff's share of the market might well be substantially the same.

(1858) Even if we assume proof of Checker's market loss to be relevant as some evidence of injury to competition in a market where few sellers are involved, genuine issues are raised by opposing affidavits to the effect that Checker's losses are due not to Chrysler's conduct but to inferior design and workmanship in Checker cabs, purchasers' difficulties in obtaining proper service, higher operational costs to taxicab owners, the expiration of restrictions requiring purchasers of medallions (from National Transportation) to buy Checker cabs, and Markin's alleged antagonizing of New York taxicab buyers by his sponsorship of a law increasing the total number of New York City medallions and his opposition to fare increases.

Chrysler further contends that its Rebate Plan has had the effect of promoting competition among competing taxicab manufacturers rather than inhibiting such competition, and states that Ford and General Motors have put into effect subsidies, rebates, other cash inducements and depreciation plans to retail taxi purchasers that are the equivalent of Chrysler's plan. Against this contention is the possibility (neither suggested by Checker[10] nor sup-

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[10] The District Court is in error. Checker's brief in the District Court specifically stated:

> ". . . even if we assume, *arguendo,* that selective wholesale price-cutting is legal under the Sherman Act, absent other factors, that is precisely what Chrysler did *not* do in the case at bar.
>
> "Chrysler might have cut the wholesale price on taxicabs to its dealers and then let the dealers determine for themselves

(*Footnote continued on following page*)

ported by any proof) that the rebate may foreclose price negotiations and haggling between Chrysler dealers and taxicab purchasers with respect to the deduction from Chrysler's suggested list price that would be made if Chrysler had granted a straight (1859) $183 price reduction to its dealer instead of an automatic rebate directly to the purchaser. While such negotiations could result in the buyer's paying a higher net price than he would with an automatic $183 rebate in those instances where dealers chose not to pass the entire reduction along to their customers, this hardly indicates that competition is adversely affected by the Rebate Plan, the effect of which appears to be to increase interbrand competition among taxicab manufacturers, including Ford and General Motors, to a greater degree than would have been the case had Chrysler simply reduced its prices to dealers.

In view of the apparent benefit to competition from the Rebate Plan, and the speculative nature of any possible detriments, Checker's motion, insofar as it attacks the Rebate Plan under § 1 of the Sherman Act, must be denied, and a determination as to the plan's legality should await trial.

The § 2(a), Robinson-Patman Act, Claim

Checker next seeks summary judgment on the ground that the Rebate Plan was part of an unlawful primary line

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(*Footnote continued from previous page*)

> how much of the price reduction, if any, to pass along to their customers. But Chrysler evidently did not want to give its dealers that kind of flexibility. It wanted to make sure that the entire $183 price cut was passed on to its customers and accordingly devised its elaborate rebate program. . . ." (1660)

As to the District Court's contention that there was "no proof" that the direct rebate may foreclose negotiations and haggling with respect to the $183 price reduction, we respectfully refer the Court to page 20 of this petition for certiorari where we show that Chrysler admitted it did not wish to give its dealers discretion to determine how much of the $183 price cut should be passed on to the retail customers.

price discrimination between the sale of taxicabs and passenger automobiles which may substantially lessen competition in the sale of taxicabs, in violaton of § 2(a) of the Robinson-Patman Act, 15 U.S.C.A. (1860) § 13(a).* Its theory is that Chrysler's taxicabs are in every respect either equal or superior in quality to its passenger cars, and that therefore, in the context of a price discrimination in favor of taxicabs, the two vehicles should be regarded as possessing "like grade and quality."

In response to Checker's contention that the Rebate Plan caused an unlawful "price discrimination," i.e., a price difference, *FTC* v. *Anheuser-Busch, Inc.*, 363 U. S. 536, 549 (1960), between taxicab purchasers and passenger car buyers, Chrysler argues that since Checker has not come forward with any evidence as to the retail prices at which the two vehicles are sold, price discrimination in violation of § 2(a) has not been shown. While a rebate may be violative of the Robinson-Patman Act, it is elementary that some proof indicating that it may result in discriminatory prices must be adduced. *American News Co.* v. *FTC*, 300 F. 2d 102 (2d Cir. 1962) (Clark, J.), *cert. denied*, 371 U. S. 824 (1962); *Moog Industries* v. (1861) *FTC*, 238 F. 2d 43 (8th Cir. 1956), *aff'd.*, 355 U. S. 411 (1958). In the absence of any evidence as to retail prices of taxicabs and passenger cars, the Court cannot assume on this motion that except for the $183 rebate to taxicab buyers, the prices of taxicabs and passenger cars would be

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* It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."

identical. Unlikely as it may be, it is possible that the $183 rebate results in identity of price to the two customer categories. Accordingly, resolution of the question must await trial, at which the prices of the two categories may be introduced.

Chrysler next contends that it could not in any event have violated the prohibitions of the Robinson-Patman Act, because the alleged price discrimination was not between different purchasers from the manufacturer, but only between purchasers from Chrysler's independently franchised dealers after the latter had purchased, paid for, and acquired ownership of the vehicles. Thus, Chrysler argues, it is not a person who discriminates in price "between different purchasers" as required by § 2(a). In reply Checker invokes the "indirect purchaser" doctrine, *American News Co.* v. *F.T.C,* 300 F. 2d 104, 109 (2d Cir.), *cert. denied,* 371 U. S. 824 (1962), as the basis for urging that retail purchasers of taxicabs and passenger vehicles from Chrysler's franchised dealers are "purchasers" from Chrysler, within the meaning of § 2(a).

The application of the "indirect purchaser" doctrine to (1862) a particular case depends upon showing that the manufacturer deals directly with the alleged "purchaser" and "controls the terms upon which he buys." *American News Co.* v. *FTC,* 300 F. 2d at 109; *K. S. Corp.* v. *Chemstrand Corp.,* 198 F. Supp. 310, 312-13 (S.D.N.Y. 1961); *Purolator Prods., Inc.* v. *FTC,* 352 F. 2d 874 (7th Cir. 1965), *cert. denied,* 389 U. S. 1045 (1968).

> "The 'customer' or 'purchaser' requirement marks one of the outer limits of the seller's responsibility not to discriminate. As long as he exercises control over the terms of a transaction he is held to this duty; otherwise the requirement of the statute could be easily avoided by the use of a 'dummy' wholesaler. If there is no control the duty naturally ends, for the manufacturer has no power to protect the buyer's competitors." (*American News Co.* v. *FTC,* 300 F2d at 109-10)

The Supreme Court has recently given added vitality to the doctrine by eliminating the direct dealing and control requirements with respect to the disfavored "indirect purchaser" where the defendant has engaged in direct sales to the favored purchaser. *FTC* v. *Fred Meyer, Inc.*, 36 U. S. Law Week 4233, —— U. S. —— (1968). However, the *Meyer* Court did not question the *American News* test as applied to the situation in which "a supplier in effect supplants his immediate distributors in dealings with those to whom the distributors resell and favors some the [sic] distributors' accounts over others." 36 U. S. Law Week at 4237, —— U. S. ——.

In the present case Chrysler suggests the resale price at which its dealers resell taxicabs and passenger cars, and engages (1863) in advertising campaigns to promote the sale of its vehicles to the public. With respect to the rebate, Chrysler not only sets the amount of the rebate, but also unilaterally controls the terms and conditions under which it is granted, receives the completed form, and pays the rebate directly to the taxi purchaser. However, the dealer is free to negotiate the ultimate price with his customer, offsetting the $183 rebate if he desires, and in fact appears to deviate from the manufacturer's resale price in making his sales. Further, with the exception of the rebate, Chrysler has no direct personal relationship with the taxi purchaser. In *American News,* as distinguished from the situation before us, the seller not only gave rebates to the favored indirect purchaser but also fixed the prices, terms, and conditions of sale. In *Purolator Prods., Inc.* v. *FTC,* 352 F.2d 874 (7th Cir. 1965), *cert. denied,* 389 U.S. 1045 (1968), the Court, accepting and applying the test of manufacturer control of the terms of resale, upheld a finding of an "indirect purchaser" relationship based on evidence that the manufacturer (1) had at one time had the legal right to control independent warehouse distributor sales; (2) had supplied warehouse distributors with their sales agreements and suggested resale price lists; (3)

had solicited the indirect purchasers (the jobbers) and urged them to maintain prices which for the most part they had done; and (4) had directly negotiated franchise agreements and (1864) changes in price with the indirect purchasers. See *Joseph A. Kaplan & Sons, Inc.* v. *FTC,* 347 F. 2d 785 (D. C. Cir. 1965).

In this case the papers reveal a sharp issue as to whether Chrysler exercised sufficient control over the terms and conditions of its dealers' resales of passenger cars and taxicabs to warrant a determination that the dealers' customers were Chryslers' "indirect purchasers." Since the resolution of that issue hinges upon the number and quality of contacts between the manufacturer and the alleged indirect purchaser, it must await trial. *K. S. Corp.* v. *Chemstrand Corp.,* 198 F. Supp. 310, 313 (S.D.N.Y. 1961). On the other hand, Chrysler's contention that the "indirect purchaser" doctrine does not apply to a case where the indirect purchasers are consumers rather than retailers must be rejected as frivolous, being unsupported by the underlying purposes of the doctrine.

Chrysler next challenges the proposition that its taxicabs and its passenger cars are of "like grade and quality." In *Atalanta Trading Corp.* v. *FTC,* 258 F. 2d 365 (2d Cir. 1958), the Second Circuit held that Canadian bacon, ham and pork shoulders were not of "like grade and quality" reasoning as follows:

> "The test of products of like grade and quality was evolved to prevent emasculation of the section by a supplier's making artificial distinctions in his product but this does not mean that all distinctions are to be disregarded. Such a holding would lead to the conclusion that all articles of food are competitive, each with the other—an obvious absurdity. Merely because (1865) various articles of food are derived from a common source (in this case, the pig), should not force the vendor of a broad line of such products to market or promote all simultaneously and in an identical fash-

> ion. The dietetic habits of the consuming public are not to be controlled by judicial fiat." (258 F. 2d at 371)

However, cross-elasticity of demand, substitutability, physical appearance, and identity of performance, are factors to be considered in determining whether goods are of "like grade and quality." From the moving papers, a number of differences between Chrysler's passenger cars and taxicabs appear. The former contains more chrome; more attractive paint; seat covers that are aesthetically more desirable to purchasers of passenger cars; and various mechanical differences related to the type of driving normally undertaken by taxi drivers and passenger car drivers. Although it seems clear that denominating one vehicle a "taxicab" and an identical one a "passenger car" will not preclude a finding of "like grade and quality," *FTC* v. *Borden Co.*, 383 U. S. 637 (1966), if there are substantial physical differences in products affecting consumer use, preference or marketability, such products are not of "like grade and quality," regardless of manufacturing costs. *Quaker Oats Co.*, 1963-65 FTC Complaints, Orders, Stipulations ¶ 17,134 (1964). See generally, Comment, Like Grade and Quality: Emergence of the Commercial Standard, 26 Ohio State L. J. 294 (1965). The existence of some physical differences between Chrysler taxicabs (1866) and passenger cars, coupled with conflicting contentions as to their effect upon cross-elasticity of use, precludes application of the principle that mere differences between "standard" and "premium" brands are insufficient to render them different in grade and quality. E.g., *E. B. Muller & Co.* v. *FTC*, 142 F. 2d 511 (6th Cir. 1944). Whether the differences between Chrysler's taxicabs and passenger cars are minor and unsubstantial (as claimed by Checker) or substantial enough to affect consumer use, preference or marketability, presents a genuine issue of fact which cannot properly be resolved upon this motion for summary judgment. *United States* v. *Diebold, Inc.*,

369 U. S. 654 (1962); *Gordon* v. *Vincent Youmans, Inc.*, 358 F. 2d 261 (2d Cir. 1965).

Chrysler challenges the proposition that buyers of taxicabs and passenger cars are "purchasers" entitled to equal treatment within the meaning of § 2(a). Its theory is that the Robinson-Patman Act was never intended to place the users of passenger cars for pleasure purposes on a par with those who use their automobiles to earn their livelihood, e.g., taxicab owners. However, even if it were agreed that all passenger car owners use their vehicles solely for pleasure, this contention erroneously assumes that § 2(a) was designed to protect only competing purchasers. That section also protects sellers competing against the grantor of the discriminatory price. The mere fact that the favored (1867) and disfavored purchasers are not in competition *inter se* does not preclude a Robinson-Patman violation in a primary line case. See *Utah Pie Co.* v. *Continental Baking Co.*, 386 U. S. 685 (1967); *FTC* v. *Anheuser-Busch, Inc.*, 363 U. S. 536 (1960). Moreover, a secondary line case, *FTC* v. *Borden Co.*, 383 U. S. 637 (1966), holds that a seller cannot discriminate between prices charged by it for nationally advertised and private brands where the goods contained in each are of "like grade and quality." *Borden* implicitly assumes that the mere fact that one class of purchasers are more aware of market conditions and more knowledgeable of the product's qualities does not justify a price discrimination against a class that is without this information. Therefore, the contention made by Chrysler must be rejected.

Chrysler alleges that its Rebate Plan falls within § 2(b)'s "good faith meeting competition" defense, 15 U.S.C. § 13(b),* because Ford and General Motors offer rebates

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* "*Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

equal to or in excess of $183 in the sale of their taxicabs. However, one of the requirements of this defense is that the seller demonstrates that his reduced price was to meet a competitor's equally low price. See (1868) *FTC* v. *Sun Oil Co.*, 371 U. S. 505, 514-15 (1963). Chrysler's plan was begun in 1962. Its affidavits and exhibits tend to show that Ford and General Motors did not commence their rebate arrangements until sometime during or after 1964. Since Chrysler, which has the burden on this issue, *FTC* v. *Sun Oil Co.*, 371 U. S. at 514, has not demonstrated that its Rebate Plan was introduced in response to a rival's rebate scheme, it cannot assert the § 2(b) defense as a basis for summary judgment in its favor.

Chrysler next asserts that because its Rebate Plan was carried out on a nationwide basis and Checker is a manufacturer selling taxicabs to customers in several other cities, the entire United States, rather than New York, is the relevant market in which to appraise the injury to competition involved in this case. Without attempting to bind the trial court to a market definition that inevitably necessitates a detailed probative analysis of the underlying economic data, *FTC* v. *Sun Oil Co.*, 371 U. S. 505, 527 (1963); *Reines Distributors, Inc.* v. *Admiral Corp.*, 5 CCH Trade Reg. Rep. ¶72,151, p. 84,145 (S.D.N.Y. 1967); see *Tampa Elec. Co.* v. *Nashville Coal Co.*, 365 U. S. 320, 330-33 (1961), the papers submitted indicate that New York City is a separate and distinct market.

With respect to the question of whether the effect of the alleged discrimination may have been "substantially to lessen competition," the Court has already alluded (supra pp. 17-18) to the (1869) parties' conflicting contentions as to the cause of Checker's loss of sales and taxicab registrations in New York City which cannot be resolved on this motion and must await trial. For the same reasons it is unnecessary at this stage to pass upon Chrysler's contention that the alleged discrimination was not made in the course of interstate commerce as required by § 2(a) and

that the case involves only intrastate sales by franchise dealers to purchasers within the state. *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564 (1943); *Burke* v. *Ford*, 377 F. 2d 901 (10th Cir. 1967).

Preliminary Injunctive Relief

Since the factual issues raised with respect to both the Sherman Act and Robinson-Patman Act claims on this motion raise a serious doubt as to whether Checker will ultimately prevail, preliminary injunctive relief must be denied. *Clairol, Inc.* v. *The Gillette Co.*, Dkt. No. 31653, —— F. 2d —— (2d Cir. 1968). Furthermore, a review of the hardships and equities does not disclose a balance favoring injunctive relief. *Hamilton Watch Co.* v. *Benrus Watch Co.*, 206 F. 2d 738, 743 (2d Cir. 1953); *Blaich* v. *National Football League*, 212 F. Supp. 319, 322-24 (S.D.N.Y. 1962). In addition the antitrust laws afford plaintiff treble damage relief for any loss sustained as a result of Chrysler's unlawful conduct. Since any drop in Checker taxicab sales caused by continuation of the Rebate Plan is capable of fairly precise measurement, it will (1870) not suffer irreparable harm from the denial of relief. See *FMC* v. *Atlantic & Gulf/Panama Canal Zone*, 241 F. Supp. 766, 780-81 (S.D.N.Y. 1965).

In the light of all of the above considerations, see *Perry* v. *Perry*, 190 F. 2d 601, 602 (D. C. Cir. 1951) (Bazelon, J.), Checker is not entitled to preliminary injunctive relief.

So Ordered.

Walter R. Mansfield,
U.S.D.J.

Dated: March 29, 1968.

APPENDIX B

Opinion of the United States Court of Appeals for the Second Circuit, dated January 6, 1969.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 81—September Term, 1968.

(Argued October 16, 1968 Decided January 6, 1969.)

Docket No. 32406

CHECKER MOTORS CORPORATION,

Plaintiff-Appellant,

v.

CHRYSLER CORPORATION and CHRYSLER MOTORS CORPORATION,

Defendants-Appellees,

CHECKER TAXI COMPANY, INC., *et al.*,

Additional Defendants on Counterclaim.

Before:

WATERMAN and MOORE, *Circuit Judges,*
BONSAL, *District Judge.**

Plaintiff-appellant seeks reversal of order entered below, United States District Court for the Southern District

* Of the Southern District of New York, sitting by designation.

of New York. Mansfield, *J.*, denying its motion for partial summary judgment against defendant-appellees and its motion, in the alternative, for a preliminary injunction against defendant-appellees pending full and final hearing of its action complaining against appellees for alleged violation of the Sherman Antitrust Act and the Clayton Act as amended by the Robinson-Patman Price Discrimination Act. The opinion below is reported at 283 F. Supp. 876 (1968). The order denying relief is affirmed.

JESSE CLIMENKO, Shea, Gallop, Climenko & Gould, New York City, *for Plaintiff-Appellant.*

ROBERT EHRENBARD, Clark J. Gurney, Dale A. Schreiber, Kelley, Drye, Newhall, Maginnes & Warren, New York City, *for Defendants-Appellees.*

WATERMAN, *Circuit Judge:*

Plaintiff, Checker Motors Corporation (Checker), is a New Jersey corporation engaged principally in the production and sale of the familiar "Checker" taxicabs. The defendants, Chrysler Corporation, the third largest automobile manufacturer in the United States, and its wholly owned sales subsidiary, Chrysler Motors Corporation (Chrysler), are competitors of Checker in the taxicab market. In April 1964 Checker, pursuant to §§ 4 and 16 of the Clayton Act, 15 U. S. C. §§ 15 and 26, commenced a private suit for treble damages and injunctive relief, alleging numerous violations by the defendants of the antitrust laws. The instant appeal, however, deals only with the legality of a national rebate plan (Commercial Fleet Value

Program) employed by Chrysler since 1962 whereby the purchase of a taxicab from any authorized Chrysler dealer entitles the buyer to receive an automatic cash rebate.[1] The plan operates without any participation by Chrysler dealers; upon application to Chrysler by purchasers of commercial fleet vehicles the cash discount, a sum which is not contingent upon the purchase price charged by the dealer, is paid to the buyers directly by Chrysler. The dealers do, however, partake in some of the advertisement of the program.

In the court below Checker moved for partial summary judgment. It claimed that the rebate plan as used in the New York City market[2] constituted (1) a per se price-fixing violation of § 1 of the Sherman Act, 15 U. S. C. § 1; and (2) a discriminatory pricing arrangement in violation of § 2(a) of the Robinson-Patman Act, 15 U. S. C. § 13(a). Additionally, as an alternative to its motion for partial summary judgment, Checker sought a preliminary injunction enjoining Chrysler from maintaining the rebate plan during the pendency of the litigation. Judge Mansfield of the United States District Court for the Southern District of New York denied both the motion for partial summary judgment and the motion for a preliminary injunction *pendente lite*. Judge Mansfield's opinion is reported at 283 F. Supp. 876 (SDNY 1968). Pursuant to 28 U. S. C. § 1292 (a)(1), Checker now appeals the portion of the district court's order that denied the preliminary injunction. Our review is limited accordingly.

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[1] In 1962 when the Commercial Fleet Value Program was initially instituted, purchasers of two or more taxicabs could receive a rebate of up to $200 per taxicab from Chrysler. In 1966 and 1967, the plan was altered so as to give rebates to purchasers of single taxicabs and the rebates were set at $183 per vehicle.

[2] Though Chrysler's rebate plan is national in character, plaintiff limited its motion to the New York City market because it considered that market to be one of its major markets in the nation and allegedly the market in which Chrysler's plan caused Checker the greatest business injury.

The district court held that the charge that Chrysler's rebate plan violates the Robinson-Patman Act is a question of fact to be determined at trial. Checker does not quarrel with that part of the decision below, and therefore we need not concern ourselves with the district court's disposition of the Robinson-Patman claim. Rather, in reviewing the propriety of the district court's denial of Checker's request for a preliminary injunction, only two questions warrant our attention:

(1) Is Chrysler's rebate plan a price-fixing arrangement, and, thus, illegal per se under § 1 of the Sherman Act; if so plaintiff may have been entitled to final judgment on the merits;[3] and

(2) If the plan is not illegal per se did the district court abuse its discretion in declining to enjoin use of it pending a further test of the plan's legalty at trial. For the reasons to follow, we answer both questions in the negative and affirm the decision below.

A lengthy discussion is unnecessary. The per se illegality of price-fixing agreements under the Sherman Act is a principle to which our courts have consistently adhered. See *United States* v. *New Wrinkle, Inc.*, 342 U. S. 371, 377 (1952); *United States* v. *National Ass'n of Real Estate Boards*, 339 U. S. 485, 489 (1950); *United States* v. *Masonite Corp.*, 316 U. S. 265, 274 (1942); *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940); *United States* v. *Trenton Potteries*, 273 U. S. 392 (1927). The Supreme Court has said that any arrangement which in any manner "tampers with price structures" constitutes unlawful price-fixing, *Socony-Vacuum*, *supra* at 221. *E.g.*, see

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[3] Resolution of the price-fixing issue in a manner favorable to Checker would create another question, which we do not here decide, before a § 1 violation could be made out: whether the rebate plan is a contract, combination or conspiracy within the meaning of § 1.

cases collected by Judge Mansfield below, 283 F. Supp. at 882. Nevertheless, determining whether a particular scheme should be classified as a price-fixing device has not always been an easy task. Compare the above cases with *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344 (1933); *Window Glass Mfrs.* v. *United States*, 263 U. S. 403 (1923); *Chicago Board of Trade* v. *United States*, 246 U. S. 231 (1918); *United States* v. *Columbia Pictures Corp.*, 189 F. Supp. 153 (SDNY 1960).

In *Susser* v. *Carvel Corporation*, 332 F. 2d 505, 510 (2 Cir.), *cert. granted*, 379 U. S. 885 (1964), *cert. dismissed as improvidently granted*, 381 U. S. 125 (1965), we held that an ice cream manufacturer's practice of recommending a retail price to its franchised dealers was lawful where "the franchise provisions explicitly reserved to the individual dealer the right to set whatever price he desired" and where no attempts to enforce the price structure were shown. Similarly, in the case at bar, the district court declined to find that Chrysler's rebate plan is unlawful per se under § 1 of the Sherman Act for there is an absence of proof that the plan tends to "affect the exercise of competitive pricing discretion, or to affect or tamper with the range, level, scale, or amount of the price paid for Chrysler taxicabs. . . ." Rather, the court viewed the plan as a mere promotional device, reasoning as follows:

> On its face Chrysler's Rebate Plan does not curtail the dealer's pricing discretion. Each dealer is free (1) to raise retail taxicab prices, thus nullifying the effect of the rebate; (2) to keep his prices constant, and thus render Chrysler taxicab price competitive vis a vis General Motors, Ford, Checker and other automobile makers who grant similar rebates; or (3) to lower his prices still further in competition against both Chrysler and non-Chrysler dealers alike. No evidence has been offered to the effect that the $183 rebate has even the slightest tendency to restrict in any way the

dealer's independent decision and determination as to the retail sales price quoted by him to customers for Chrysler taxicabs. The most that appears from the record before us is that the plan manifests to the taxicab purchaser a desire on Chrysler's part to promote competitive sale of its taxis, at least to the extent of giving the appearance of a price advantage to the customer in the form of a $183 rebate. Possibly the practice acts as a psychological inducement to the customer that cannot be realized through a direct price reduction to the dealer in the identical amount which would, as a practical matter, enable the dealer in his discretion to reduce his price accordingly. Certainly the marketplace is full of similar manufacturer-originated promotional sales "gimmicks," such as "free goods" in the grocery and drug trades, coupons entitling the holder to cash or discounts, and the like, which do not run afoul of the Sherman Act in the absence of a showing of impropriety. The plan does not give as much practical pricing flexibility to the Chrysler dealer as would a direct $183 price reduction in the wholesale price, since the customer, rather than the dealer, is automatically entitled to the rebate upon purchase of a Chrysler taxicab, whereas if Chrysler reduced the price to its dealers by $183, bargaining between each dealer and his customer might ensue to determine how much of the reduction, if any, would be passed along to the retail customer. However, this is an illusory distinction, since the dealer has the freedom to increase his retail price to offset the $183 rebate. 283 F. Supp. at 882-883.

Indeed, all of the evidence indicates that the Chrysler dealers are free to sell at their own prices and that the manufacturer's rebate plan is in the nature of an advertising expedient. Contrary to appellant's contentions, the plan lends no assurance to Chrysler that the entire price cut will

be passed on to its dealers' customers. Nor does the availability to Chrysler of an alternative program whereby their dealers would directly receive the price discount and the individual dealers could thereafter decide whether to pass all or part of the price reduction on to their customers prohibit Chrysler's use of the discount device to which appellant objects. All that is required by § 1 for the discount device employed by Chrysler to be valid is that the pricing independence of the individual dealer remain unimpeded. Accordingly, we find the instant scheme falls squarely within our holding in *Susser, supra.*

There remains for discussion the issue of whether Checker might be entitled to a preliminary injunction even though Chrysler's rebate plan is not an illegal price fixing arrangement per se.

The district court's denial of injunctive relief was premised on its findings that there was serious doubt as to whether Checker will ultimately prevail in this action; that a review of the involved hardships and equities did not disclose a balance favoring injunctive relief; and that plaintiff's rights to recover treble damages, if successful, constituted an adequate remedy at law.

An application for a preliminary injunction is most frequently addressed to the judicial discretion of the district court. 7 Moore's Federal Practice, ¶65.04, at 1625 (2d ed. 1966). A clear abuse of discretion in such cases, not present in this case, must be shown to an appellate court in order to obtain a reversal of the trial court's denial of temporary injunctive relief. *Dino De Laurentiis Cinematografica, S. p. A.* v. *D-150, Inc.*, 366 F. 2d 373, 374-375 (2 Cir. 1966); *Ideal Toy Corp.* v. *Fab-Lu, Ltd.*, 360 F. 2d 1021 (2 Cir. 1966); Moore, *supra* at 1626.

The purpose of a preliminary injunction is to maintain the status quo pending a final determination of the merits, *Unicon Management Corp.* v. *Koppers Co.*, 366 F. 2d 199, 204 (2 Cir. 1966); *Hamilton Watch Co.* v. *Benrus Watch*

Co., 206 F. 2d 738, 742 (2 Cir. 1953); 7 Moore's Federal Practice, ¶65.04, at 1625 (2 ed. 1966). It is an extraordinary remedy, and will not be granted except upon a clear showing of probable success *and* possible irreparable injury. *Clairol, Inc.* v. *Gillette Co.*, 389 F. 2d 264, 265 (2 Cir. 1968); *Societe Comptoir De L'Indus. etc.* v. *Alexander's Department Stores*, 299 F. 2d 33, 35 (2 Cir. 1962). However, "the burden [of showing probable success] is less where the balance of hardships tips decidedly toward the party requesting the temporary relief." *Dino De Laurentiis Cinematografica, S. p. A.* v. *D-150, Inc., supra* at 375. In such a case, the moving party may obtain a preliminary injunction if he has raised questions going to the merits so serious, substantial, and difficult as to make them a fair ground for litigation and thus for more deliberate investigation. *Unicon Management Corp.* v. *Koppers Co.*, 366 F. 2d 199, 205 (2 Cir. 1966); *Dino De Laurentiis Cinematografica, S. p. A.* v. *D-150, Inc., supra; Hamilton Watch Co.* v. *Benrus Watch Co.*, 206 F. 2d 738, 740 (2 Cir. 1953).

Quite clearly, with the per se price-fixing issue resolved against it, the chance of Checker's ultimate success is dim here. It is one thing for the Sherman Act and the Robinson-Patman claims raised by Checker to contain questions ripe for litigation, and quite another thing for those issues to receive a determination favorable to plaintiff upon trial. With respect to the Sherman Act charge, Judge Mansfield's appraisal of the factors a trial court applying the rule of reason is likely to rely upon is a noteworthy appraisal. He considered that Checker's loss of dominion over the 1,600 of the 11,000 t[illegible]icab medallions it previously controlled in New York City and the unfriendly relationship between Checker's president, Morris Markin, and the city's fleet owners were more probable causes of Checker's declining sales in New York City than any possible anti-competitive effect created by Chrysler's rebate plan. Moreover, though Chrysler's rebate program is nationwide, only in New York City has Checker experienced a substantial

decrease in sales. In addition, despite the continuation by Chrysler of its program, Checker's sales drop has leveled off in recent years. Finally, it is possible that, at trial, inferior design and workmanship, inadequate service facilities, and higher operational costs to taxicab owners may prove to be additional explanations for Checker's competitive difficulties.

The success of Checker's Robinson-Patman claim depends, at least, upon the propriety of applying the "indirect purchaser" doctrine[4] and upon a finding that Chrysler taxicabs and passenger cars are of "like grade and quality." The district court's opinion amply demonstrates the improbability that either or both of these requisites will be met. In summary, we are not persuaded of either the likelihood of Checker's eventual success in this litigation or that the issues here raised are of sufficient magnitude and doubt to require the granting of a preliminary injunction.

Checker argues that it will suffer irreparable injury in the form of loss of former customers during the pendency of this action. In *Dino De Laurentiis Cinematografica, S. p. A.* v. *D-150, Inc., supra,* we held that the difficulty in computing "damages to reputation, credibility or goodwill" may justify a grant of a preliminary injunction. Our holding there was based upon finding "a sufficient showing of probable success on trial" and "a lack of likelihood of irreparable injury" to the other party if the injunction is granted. 366 F. 2d at 376, 377. In the present case, while the losses to Checker through competition with Chrysler may indeed be irreparable, unless Checker can show that Chrysler has engaged in some illegal activity, Checker will not be entitled to recover compensatory damages or to obtain injunctive relief. The district court was of the belief

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[4] See *American News Co.* v. *FTC,* 300 F. 2d 104, 109 (2 Cir.), cert. denied, 371 U. S. 824 (1962).

that Checker will be unable to prove its allegations of Chrysler wrongdoing and refused to grant Checker a temporary injunction. We hold that the court's order was a proper exercise of its discretion.[5]

Affirmed.

---

[5] We find it unnecessary to decide whether, if Checker had shown a reasonable chance of ultimate success, the availability of treble damages constitutes an adequate remedy at law, and therefore is in itself a sufficient ground upon which to deny the injunctive relief.

APPENDIX C

Pertinent Provisions of Statutes Involved.

Section 1 of the Sherman Act, 15 U.S.C. §1:

Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

July 2, 1890, c. 647, §1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

Section 4 of the Clayton Act, 15 U.S.C. §15:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, §4, 38 Stat. 731.

Section 16 of the Clayton Act, 15 U.S.C. §26:

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of

irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. Oct. 15, 1914, c. 323, § 16, 38 Stat. 737.

APPENDIX D

1967 Chrysler Rebate Plan.

1967 Chrysler Rebate Plan.

(See opposite ☞)

1967

A VALUE PROGRAM FOR COMMERCIAL FLEET OWNERS

EET SALES

CHRYSLER MOTORS CORPORATION

EXHIBIT "C"

1516

CHRYSLER MOTORS CORPORATION COMMERCIAL FLEET VALUE PROGRAM

LEADS THE WAY TO GREATER FLEET SAVINGS

Chrysler Motors Corporation is earning an impressive increase in Fleet Sales because of satisfied customers, who are convinced Chrysler-built cars carry the qualities necessary for dependable, economical fleet operation.

We have shared, in the past, and in 1967 continue to share our success with our customers in a material way . . . through the Commercial Fleet Value Program which offers a financial return on each purchase beyond a set number of vehicles.

Specific details and samples of forms used in this plan are presented on the following pages.

1967
COMMERCIAL FLEET VALUE PROGRAM RULES

PROGRAM PERIOD—All Eligible Models Purchased through the Day Preceding the Public Announcement Date of the 1968 Model Chrysler Corporation-built passenger cars.

ELIGIBLE MODELS—All new, unused, and unsold 1967 model Chrysler Corporation-built passenger cars sold at retail and delivered to Qualified Fleet Customers in the Fifty (50) United States and the District of Columbia by an authorized Chrysler Motors Corporation dealer during the Program Period in excess of purchase objectives established by Chrysler Motors Corporation in accordance with instructions outlined below, under "Establishment of Fleet Purchase Objectives."

QUALIFIED FLEET CUSTOMERS

A-OPTION #1 (Commercial Customers)—Those fleet customers who appear on R. L. Polk listing of ten (10) or more passenger cars for the year 1964 or 1965 and who enroll in the program by filling out a "Qualified Commercial Fleet Account Enrollment Form," Exhibit "A" (See page 6), will be Qualified Fleet Customers. Complete alphabetical listings of these fleet customers are on file in each Chrysler Motors Corporation Fleet Regional Office for reference and verification.

B-OPTION #2 (Commercial Customers)—Those fleet customers who are not listed by R. L. Polk as in Option #1 can qualify as Qualified Fleet Customers by establishing to Chrysler Motors Corporation's satisfaction that they operate ten (10) or more passenger cars, registered in their name, that are not leased or rented from any lease or rental company. Any such fleet customer should fill out a "Commercial Fleet Application Form" Exhibit "B" (See page 6).

C-OPTION #3 (Taxicab Customers)—All taxicab owners or trustees administrating taxicab fleets purchasing other than taxicabs, used solely for business purposes, can qualify as Qualified Fleet Customers by establishing to Chrysler Motors Corporation's satisfaction that such passenger cars are registered in their name and are not leased or rented from any leasing or rental company. Any such fleet customer should fill out a "Commercial Fleet Application Form," Exhibit "B" (See page 6).

D-OPTION #4 (Taxicab Customers)—All taxicab owners or trustees administrating taxicab fleets will become Qualified Fleet Customers for taxicabs only upon completing a "Qualified Commercial Fleet Account Enrollment Form," Exhibit "A" (See page 6).

Lease and rental companies and City, County, State, Federal and all other governmental bodies do not qualify as Qualified Fleet Customers under this Program.

ESTABLISHMENT OF FLEET PURCHASE OBJECTIVES

Each Qualified Fleet Customer will be given a purchase objective. Purchase objectives for fleet customers who are subsidiaries of parent companies will be included in that of the parent companies and will be based on the combined total number of cars purchased and registered by the parent companies and their subsidiaries.

1518.

Purchases in excess of purchase objectives that qualify under this Program will be determined by the combined total thereof by the parent companies and their branches and subsidiaries. No vehicle will be counted in determining total purchases unless it is maintained in service by the Qualified Fleet Customer for at least 6 months.

1. The purchase objective of a fleet customer that qualified under Option #1, will be seven and one half per cent (7.5%) of its 1964 and 1965 combined total new passenger car registrations.

2. The purchase objective of a fleet customer (other than a taxicab customer) that qualified under Option #2, will be seven and one half per cent (7.5%) of the total number of passenger cars registered and operated by said fleet customer.

3. The purchase objective of a taxicab customer for its purchases of passenger cars other than taxicabs (Qualification under Option #3), will be seven and one half per cent (7.5%) of the total number of passenger cars other than taxicabs registered and operated by said customer.

4. The purchase objective for a Qualified Taxicab Customer on its purchases of taxicabs is zero; thus all taxicab purchases by such customers will qualify under this Program.

All purchase objectives will be rounded to the nearest whole unit.

The minimum objective under items 1, 2 and 3 will be one (1) unit.

PROGRAM EARNINGS—Chrysler Motors Corporation will pay to Qualified Fleet Customers, for each eligible 1967 model passenger car they purchase from an authorized Chrysler Motors Corporation dealer in excess of their fleet purchase objectives during the Program period as follows:

Taxicabs—Payment of $183 per unit will be made on each of the following taxicab models:

Carline	Body Code Number
Plymouth Belvedere	RT41
Plymouth Fury	PT41
Dodge Coronet	WT41
Dodge Polara	DT41

Passenger Cars Other Than Taxicabs

	Minimum Bracket Payment	Maximum Bracket Payment
Valiant, Barracuda, and Dart	$ 75	$125
Plymouth Belvedere and Satellite		
Dodge Coronet and Charger	150	200
Plymouth Fury, Sport Fury and VIP		
Dodge Polara, Monaco, Monaco 500,		
Chrysler and Imperial	175	225

Minimum bracket payments will be made on units commencing with the first unit after the purchase objective has been reached and continue up to and including the unit with which the customer reaches double its purchase objective. Maximum bracket payments will be made on all additional units.

Examples:

Total 1964-1965 R. L. Polk Registrations	Objective @ 7.5%	Minimum Bracket Payment	Maximum Bracket Payment
90	2 Units	Units 3-4	Units 5-Up
50	4 Units	Units 5-8	Units 9-Up
250	19 Units	Units 20-38	Units 39-Up
500	38 Units	Units 39-76	Units 77-Up

In instances where objective units and payment units are purchased at the same time and are a combination of several Eligible Models, an average dollar amount will be determined.

EXAMPLE: A fleet customer has a combined total fleet of 100 passenger cars registered in R. L. Polk during 1964 and 1965. His purchase objective is 7.5% or 7.5 Units—rounded to 8 Units. His minimum bracket payment is from 9 to 16 Units; and his maximum bracket payment commences with the 17th Unit. He purchases 10 Valiants, 10 Belvederes, and 10 Furys taking delivery at one time of all 30 Units. His payment will be determined as follows:

	Objective Units	Payment Units Minimum Bracket (Begins with 9th Unit)	Payment Units Maximum Bracket (Begins with 17th Unit)	Total Payment
Valiant	3	3 @ $ 75	4 @ $125	$ 725
Belvedere	3	3 @ 150	4 @ 200	1250
Fury	2	2 @ 175	6 @ 225	1700
Total	8	8	14	22 - $3675

REPORTING OF FLEET PURCHASES—The attached form, Exhibit "C" (See page 6), "Commercial Fleet Value Program Certificate," must be completely and accurately filled out by each Qualified Fleet Customer. Reports of deliveries must be postmarked on or before 11:59 P. M., October 10, 1967, in order to qualify for payment.

SPECIAL REGISTRATION PROCEDURE—Eligible Models registered in the name of individuals pursuant to an accepted procedure of a Qualified Fleet Customer to register all units in the name of a trustee or other such party, which units are beneficially owned by the company appointing such trustee or individual, will qualify for this Program. If such a procedure is in effect, it will be necessary that the Qualified Fleet Customer make a formal application to program headquarters, spelling this out in a document signed by an officer of the Qualified Fleet Customer.

VERIFICATION OF REPORTS—By participating under the terms of this Program, Qualified Fleet Customers give Chrysler Motors Corporation the right to verify reported fleet deliveries and retention periods by audit of their records for a period of one year following date of payment. Qualified Fleet Customers must maintain records supporting payments for at least one year following the date of payment. All payments are made subject to subsequent audit of fleet customers' books and records by Chrysler Motors Corporation.

PAYMENT—Payments on Eligible Models will be made to Qualified Fleet Customers within ninety (90) days following receipt of Commercial Fleet Value Program Certificate(s) by Chrysler Motors Corporation.

All payments will be made directly to the Qualified Fleet Customers. Further explanation or clarification of this plan or forms used, can be obtained by contacting the Chrysler Motors Corporation Regional Fleet Offices listed for your convenience on the back cover of this brochure.

INTERPRETATION—Chrysler Motors Corporation reserves the right to resolve any questions or disputes arising under the Program and, in making application, participants agree to accept Chrysler Motors Corporation decisions and waive all rights to bring suit for any reason whatsoever on any matter arising out of or related to the Program.

Examples:

Total 1964-1965 R. L. Polk Registrations	Objective @ 7.5%	Minimum Bracket Payment	Maximum Bracket Payment
30	2 Units	Units 3-4	Units 5-Up
50	4 Units	Units 5-8	Units 9-Up
250	18 Units	Units 20-38	Units 39-Up
500	38 Units	Units 39-76	Units 77-Up

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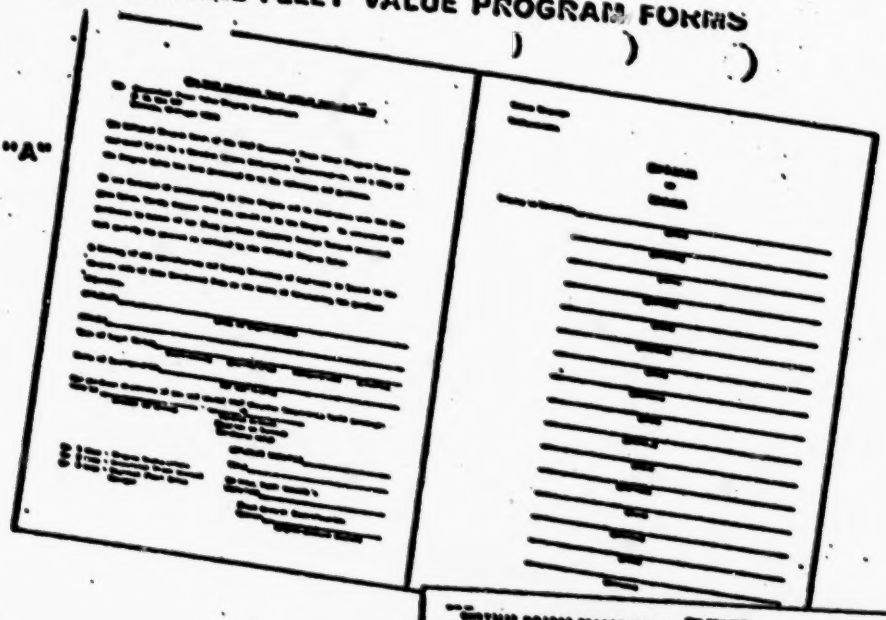
COMMERCIAL FLEET VALUE PROGRAM FORMS

EXHIBIT "A"



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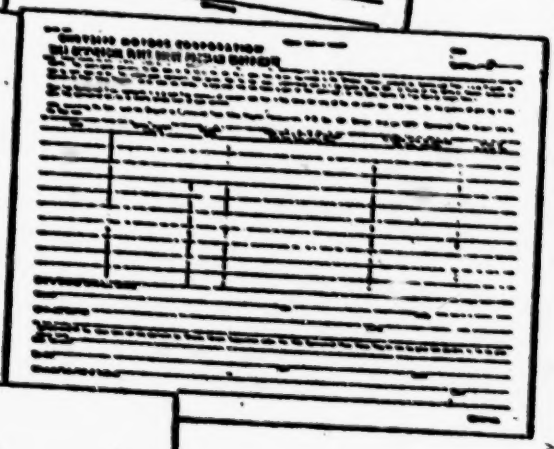
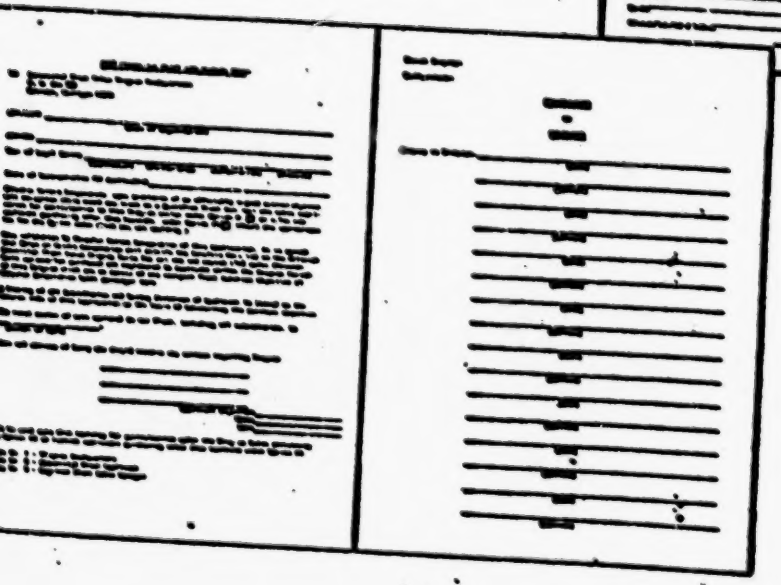


EXHIBIT "B"



CHRYSLER CORPORATION'S 5 YEAR, 50,000 MILE WARRANTY...

The Strongest Warranty In The Industry Assures YOU The Lowest Fleet Maintenance Costs!

Chrysler Corporation warrants for 5 years or 50,000 miles, whichever comes first, against defects in materials and workmanship and will replace or repair at any Imperial, Chrysler, Plymouth or Dodge Authorized Dealer's place of business, the engine block, head and internal parts, intake manifold, water pump, transmission case and internal parts (excluding manual clutch), torque convertor, drive shaft, universal joints, rear axle and differential, and rear wheel bearings of its 1967 automobiles, provided the owner has the engine oil changed every 3 months or 4,000 miles, whichever comes first, the oil filter replaced every second oil change and the carburetor air filter cleaned every 6 months and replaced every 2 years, and every 6 months furnishes to such a dealer evidence of performance of the required service, and requests the dealer to certify (1) receipt of such evidence and (2) the car's then current mileage.

FOR FURTHER INFORMATION CONTACT ANY OF THESE CHRYSLER MOTORS CORPORATION REGIONAL FLEET OFFICES:

ATLANTA
F. E. Carpenter, Reg. Fleet Mgr.
2930 Forrest Hills Drive S. W.
Atlanta 15, Georgia
Phone: A/C 404—766-7811

BOSTON
T. H. White, Reg. Fleet Mgr.
Dedham Office Park—Room 349
886 Washington Street
Dedham, Massachusetts
Phone: A/C 617—326-6360

CHICAGO
R. M. Brown, Reg. Fleet Mgr.
The Hartford Building—Room 310
100 South Wacker Drive
Chicago, Illinois
Phone: A/C 312—372-4227

CINCINNATI
J. W. Fulkerson, Reg. Fleet Mgr.
1821 Summit Road
Summit Executive Bldg.
Cincinnati, Ohio
Phone: A/C 513—761-3327

CLEVELAND
R. E. Stencel, Reg. Fleet Mgr.
M. H. K. Building
3550 Warrensville Center Road
Shaker Heights, Ohio
Phone: A/C 216—751-8388

DALLAS
W. G. Jones, Reg. Fleet Mgr.
998 Treadway Plaza
Exchange Park North
Dallas, Texas
Phone: A/C 214—352-9700

DENVER
R. L. Fuhrmeister, Reg. Fleet Mgr.
Western Farm Bureau Bldg., Suite 201
1200 Lincoln Avenue
Denver, Colorado
Phone: A/C 303—266-1110

DETROIT
D. J. Bowie, Reg. Fleet Mgr.
26301 Lawrence Avenue
Center Line, Michigan
Phone: A/C 313—539-3000

JACKSONVILLE
R. L. McMahon, Reg. Fleet Mgr.
4040 Woodcock Drive, Room 248
Jacksonville, Florida
Phone: A/C 904—398-3421

KANSAS CITY
R. H. Hoekstra, Reg. Fleet Mgr.
2712 K. C. Power & Light Bldg.
106 West 14th Street
Kansas City, Missouri
Phone: A/C 816—471-0580

LOS ANGELES
W. W. MacGregor, Reg. Fleet Mgr.
Union Bank Building, Suite 914
3810 Wilshire Boulevard
Los Angeles, California
Phone: A/C 213—386-2830

MEMPHIS
E. A. Rees, Reg. Fleet Mgr.
Memphis Bank & Trust Co.
4515 Poplar Avenue
Memphis, Tennessee
Phone: A/C 901—683-6309

MILWAUKEE
W. C. Schulte, Reg. Fleet Mgr.
Lewis Center, Suite 305
615 E. Michigan Avenue
Milwaukee, Wisconsin
Phone: A/C 414—272-3402

MINNEAPOLIS
T. L. Callaghan, Reg. Fleet Mgr.
13003 State Highway
Minneapolis, Minnesota
Phone: A/C 612—545-2811

NEWARK
D. R. Howitson, Reg. Fleet Mgr.
20 Sand Park Road
Cedar Grove, New Jersey
Phone: A/C 201 239-8100

NEW YORK
H. P. Ferris, Reg. Fleet Mgr.
200 Park Avenue, Room 210
New York, New York
Phone: A/C 212—697-7766

PHILADELPHIA
H. C. Graves, Reg. Fleet Mgr.
233 Barclay Building
One Belmont Avenue
Bala Cynwyd, Pennsylvania
Phone: A/C 215—667-0420

PITTSBURGH
C. C. Robitaille, Reg. Fleet Mgr.
Parkway Center, Suite 275
875 Greentree Road
Pittsburgh, Pennsylvania
Phone : A/C 412—921-9148

PORTLAND
H. C. Johnston, Reg. Fleet Mgr.
317 Terminal Sales Bldg.
1220 S.W. Morrison
Portland, Oregon
Phone: A/C 503—228-3048

SAN FRANCISCO
H. K. Reinhard, Reg. Fleet Mgr.
Chancery Bldg., Room 715
41 Sutter Street
San Francisco, California
Phone : A/C 415—981-2757

ST. LOUIS
W. D. Parr, Reg. Fleet Mgr.
130 South Bemiston, Suite 302
Clayton, Missouri
Phone: A/C 314—721-3917

SYRACUSE
G. G. Moser, Reg. Fleet Mgr.
840 James Street
Syracuse, New York
Phone: A/C 315—474-6271

WASHINGTON, D. C.
W. M. Abbot Jr., Reg. Fleet Mgr.
Executive Bldg. Room 307
7100 Baltimore Avenue
College Park, Maryland
Phone: A/C 301—779-5900

FLEET SALES CHRYSLER MOTORS CORPORATION

1524

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IN THE

Supreme Court of the United States

October Term, 1968

No. 1156

CHECKER MOTORS CORPORATION,
Petitioner,

v.

CHRYSLER CORPORATION and
CHRYSLER MOTORS CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS CHRYSLER CORPORATION AND CHRYSLER MOTORS CORPORATION

ROBERT EHRENBARD
Attorney for Respondents
350 Park Avenue
New York, New York 10022
PL 2-5800

CLARK J. GURNEY
Of Counsel

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IN THE

Supreme Court of the United States

October Term, 1968

No. 1156

CHECKER MOTORS CORPORATION,

Petitioner,

v.

CHRYSLER CORPORATION and CHRYSLER MOTORS CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS CHRYSLER CORPORATION AND CHRYSLER MOTORS CORPORATION

Questions Presented

1. Should this Court review the exercise of discretion by the District Court denying a manufacturer a preliminary injunction to prevent a distributor from openly offering ultimate purchasers a uniform cash benefit?

2. Is a question of law presented under Section 1 of the Sherman Act that this Court should review on the denial of a preliminary injunction where there is absolutely no evidence that a distributor offering a valuable inducement to commercial consumers of its products (a) affected retail

prices in any way or (b) curtailed in any way the pricing freedom of its independent dealers and there is no irreparable injury or indeed any damage shown to have been caused thereby?

Counter-Statement of the Case

Petitioner Checker Motors Corporation seeks certiorari to the United States Court of Appeals for the Second Circuit as to its affirmance of that portion of the District Court's order denying petitioner's motion to enjoin preliminarily, but only in New York City, respondent Chrysler Motors Corporation's nationwide Commercial Fleet Value Program ("Program") on the sole ground that it is, on its face, a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. §1.* While seeking preliminary relief under 15 U.S.C. §26, petitioner took no action whatsoever with respect to the Program—which was nationally publicized and in operation eight years since 1961—until March, 1964, three years after the Program's announcement, when petitioner filed its one-count complaint (PA 28-37)** which itself made no direct allegation or claim of a Sherman Act

* Although, on appeal, petitioner abandoned that portion of its preliminary motion which claimed that the Program violated the Robinson-Patman Act, it now gratuitously asserts in its Petition that Chrysler taxicabs and pleasure cars are "the same" (P 4) and that the taxicabs are "more costly", as to which the District Court found no supporting evidence (A 19-21).

** The numbers appearing after the following abbreviations indicate the pages of the citations described after each abbreviation: PA, Plaintiff-Appellant's Appendix in the United States Court of Appeals for the Second Circuit; DA, Defendants-Respondents' Appendix in the United States Court of Appeals for the Second Circuit; R, Record on Appeal to the United States Court of Appeals for the Second Circuit not reproduced in the Appendices; A, Appendix A to Petition for a Writ of Certiorari; B, Appendix B to Petition for a Writ of Certiorari; P, Petition for a Writ of Certiorari.

violation, as noted by the District Court (A 9). Indeed, it was not until April, 1967—six years after the Program's announcement—that petitioner suddenly and for the first time asserted that the Program, on its face, constituted a price fixing conspiracy from which it needed the "immediate" and drastic relief of a preliminary injunction. 15 U.S.C. §26. No final judgment has been entered and the case below is still in the discovery stage.

In short, petitioner now complains that certain commercial vehicles manufactured by its alleged competitor, respondent Chrysler Corporation, have been lowered by the Program since under it a cash inducement is offered to qualified commercial purchasers who buy Chrysler built commercial vehicles from independent dealers and that these dealers' pricing independence has been somehow curtailed. At bottom, the grievance presented is that retail purchasers are not paying enough, or at least not as much as petitioner would like. Indeed, it is obvious that petitioner really seeks to restrict competition.

However, even assuming the factual predicates (*i.e.*, lower prices and/or curtailment of the dealers' upward pricing ability) supposed by petitioner would present a question of law which this Court should review, the Courts below have not found a speck of evidence to support either predicate and, thus, there is no basis for any review.

As to the general pricing independence of dealers who purchase Chrysler products, the District Court found as follows:

> "Chrysler distributes its vehicles to the public via a nationwide system of independent franchised dealers * * * [who] upon purchasing automobiles from it, as-

sumes the risk of loss and independently determines the retail price of automobiles purchased by it from Chrysler for sale." 283 F. Supp. at 879

As to evidence presented concerning the effect of the Program on the dealers and retail prices, the Court of Appeals quoted from the District Court's findings in relevant part as follows:

"On its face Chrysler's Rebate Plan does not curtail the dealer's pricing discretion. Each dealer is free (1) to raise retail taxicab prices, thus nullifying the effect of the rebate; (2) to keep his prices constant, and thus render Chrysler taxicab price competitive vis a vis General Motors, Ford, Checker and other automobile makers who grant similar rebates; or (3) to lower his prices still further in competition against both Chrysler and non-Chrysler dealers alike. No evidence has been offered to the effect that the $183 rebate has even the slightest tendency to restrict in any way the dealer's independent decision and determination as to the retail sales price quoted by him to customers for Chrysler taxicabs. The most that appears from the record before us is that the plan manifests to the taxicab purchaser a desire on Chrysler's part to promote competitive sale of its taxis, at least to the extent of giving the appearance of a price advantage to the customer in the form of a $183 rebate. Possibly the practice acts as a psychological inducement to the customer that cannot be realized through a direct price reduction to the dealer in the identical amount which would, as a practical matter, enable the dealer in his discretion to reduce his price accordingly. Certainly the marketplace is full of similar manufacturer-originated promotional sales 'gimmicks,' such as 'free goods' in the grocery and drug trades, coupons entitling the holder to cash or discounts, and the like, which do not run afoul of the Sherman Act in the ab-

sence of a showing of impropriety." 283 F. Supp. at 282-283

The Courts below also found that petitioner failed to demonstrate that either it (or competition*) had suffered any harm by virtue of the Program, thus, in effect, rendering moot this Court's review of the question, since Checker would in no event be entitled to a preliminary injunction. 15 U.S.C. §26 (A 11-13; B 8-9). Although the Program is admittedly nationwide, the Courts below found that petitioner's decline in sales have been localized in New York City and that the decline there is attributable to other factors and petitioner's own fault (A 11-13; B 8-9).

For example, petitioner has never faced up to the fact that the downturn in its taxicab sales in New York City was due in most part to the relinquishment under government impetus (see *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947)), beginning in the 1950's and continuing to the early 1960's, of 1,600 taxicab medallions formerly owned by its New York City operating subsidiary, National Transportation Company, Inc. These sales, which were made to various New York City taxi operators, were pre-conditioned on the operator's agreeing to buy his entire fleet from Checker for one or more years (PA 134-138; DA 5-7; R 1037, *et seq.*) and form the basis of part of respondents' counter-claim against the Checker "combine" in this action (PA 47, 48, 53). Thus, until these sales were consummated and until these "tie-in" agreements lapsed, petitioner had a captive market for taxicab sales, which ended in about 1964 and, not coincidentally, when its "sales" began to decline noticeable.

* To the contrary, the District Court found that the effect of the Program "appears to be to increase interbrand competition * * *" 283 F. Supp. at 886.

Faced with the loss of this captive and "tied-in" market, petitioner's chief-executive, Morris Markin, then began a campaign of intimidation and harassment directed against his former "customers" to brow-beat them into purchasing Checker's taxis. This campaign was hallmarked by public statements urging the New York City Hack Bureau to issue 2,000 more taxicab medallions (which depressed the price of those recently purchased from him by his potential customers) (PA 137, 138), urging a salary increase for his potential customers' employees (PA 144) and culminated in a statement to the *New York Daily News* on March 22, 1967 (PA 118) that his potential customers do not "deserve any [fare] increase * * * [and] challeng[ing] [them] to prove him a liar" (PA 118). The article further explains that Mr. Markin "enjoys the awe and resentment he inspires in local fleet owners" and quotes him as stating that when he is "through with them [he will] spit on their graves" (PA 118).

In sum, this Court is asked to review a case in its preliminary stages to determine whether a nationally advertised Program, found as a factual matter by the Courts below not to have any effect on retail prices or the selling independence of any merchant and further found not to have caused the petitioner any harm, is a *per se* price fixing conspiracy violative of 15 U.S.C. §1 entitling petitioner to a preliminary injunction under 15 U.S.C. §26. As the Court of Appeals put it, we are not "persuaded of either the likelihood of Checker's eventual success in this litigation or that the issues here raised are of sufficient magnitude and doubt to require the granting of a preliminary injunction" (B 9).

ARGUMENT

A

The decisions of the Courts below in refusing to enjoin preliminarily the Program as a *per se* price fixing violation of the Section 1 of the Sherman Act is in complete accord with the prior decisions of this Court especially in view of the District Court's findings that the Program in no way affected retail prices or the pricing freedom of any independent dealer.

To support its claim that the Program on its face constitutes a *per se* violation of the Sherman Act, petitioner must, as it concedes, make a factual demonstration, in the words of this Court, of the Program's alleged "pernicious effect on competition and lack of any redeeming virtue * * *" *White Motor Co.* v. *United States,* 372 U.S. 253, 261 (1963); *Northern Pac. R. Co.* v. *United States,* 356 U.S. 1, 5 (1958). Petitioner contends that it has proved the Program to be "perniciously" anticompetitive by speculating —without the least proof—that the payments made under the Program indirectly reduce retail price levels—that is, that these payments result in lower prices to the consumer, one of the principal hallmarks of healthy competition! See *Northern Pac. R. Co.* v. *United States,* 356 U.S. 1, 4; *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 493 (1940). However, suffice it to say that on this Petition petitioner is bound by the record and factual findings below which establish that there is no evidence that Program even has that effect (B 5-6).

Unable to show anything competitively wrong with the Program or that it has any actual effect on retail prices,

petitioner indulges in a scissors and paste-pot approach, piecing together a word here and there from many cases holding illegal horizontal arrangements designed to limit competition among competing sellers. However, they have no application to the individual conduct of a distributor who is doing nothing more than promoting the sale of its product without imposing anything on anyone else. Distributors and manufacturers in order to compete do many things to promote the sale of their products that are completely lawful. A cash incentive to consumers or ultimate purchases is surely one of them. Even if dealers or retailers take advantage of such promotional efforts there is no illegality, to say nothing of a *per se* Sherman Act violation. Indeed, unlike many horizontal price arrangements, programs between manufacturers and their distributors or retailers may be designed to, and actually, affect price without violating the Sherman Act because, among other reasons, of their stimulus to interbrand competition. For example, a manufacturer legally may suggest retail prices and his retailer may abide by them (*Susser* v. *Carvel Corp.*, 332 F. 2d 505, 510 (2d Cir.), *cert. granted*, 379 U.S. 835 (1964), *cert. dismissed as improvidently granted*, 381 U.S. 125 (1965)) and even go so far as affixing suggested prices on his products (*Plymouth Dealers' Ass'n* v. *United States*, 279 F. 2d 128, 134 (9th Cir. 1960); *Bailey's Bakery Ltd.* v. *Continental Baking Co.*, 235 F. Supp. 705, 722 (D. Hawaii 1954)); and in some circumstances the manufacturer may even allocate exclusive territories to its distributors (*White Motor Co.* v. *United States, above*, 372 U.S. at 261; *United States* v. *Schwinn*, 388 U.S. 365 (1967)). Here, respondents have not even tried to go this far and the decisions below completely conform to all of the prior decisions of this Court.

The fundamental fallacy in petitioner's position is shown by its attempt to characterize the Program, in contradiction to the facts of record, as "maximum price fixing" (P 14). But even this unsupported characterization raises no real question of law here. While holding vertical maximum price enforcement with the aid of a retailer illegal under the Sherman Act last term (see *Albrecht* v. *The Herald Company*, 390 U.S. 145 (1968), 36 U.S.L. Week 4171), this Court clearly pointed to the possible limited anticompetitive effects of such arrangements that are in no way applicable to the Program. As stated (36 U.S.L. Week at 4173):

> "Schemes to fix maximum prices, by substituting the perhaps erroneous judgment of a seller for the forces of the competitive market, may severely intrude upon the ability of buyers to compete and survive in that market. * * * [1] Maximum prices may be fixed too low for the dealer to furnish services essential to the value which goods have for the consumer or to furnish services and conveniences which consumers desire and for which they are willing to pay. [2] Maximum price fixing may channel distribution through a few large or specifically advantaged dealers who otherwise would be subject to significant nonprice competition."

Thus, even assuming against the findings and record petitioner's assertion that retail prices have been lowered, petitioner must concede (and certainly has presented no evidence to the contrary) that the Program presents not the slightest resemblance to the furthest extension of the *per se* doctrine in a vertical context. To the contrary, last term this Court approved of and required a primary seller to give a cash rebate to retail customers of its wholesalers

in a Robinson-Patman Act proceeding. *F.T.C.* v. *Fred Meyer,* 36 U.S. L. Week 4233 (1968). It is respectfully suggested that this Court would hardly have reached such a result if it could be condemned as a *per se* violation of the Sherman Act!

B

Petitioner's "contract, combination and conspiracy" claim departs from its theory below and is without substance.

In its Petition, petitioner has chosen to argue extensively the merits of whether the Program meets the threshold requirement under the Sherman Act of being a "contract, combination or conspiracy" between two or more persons. However, since the Courts below expressly refused to pass unnecessarily on this aspect of Checker's claim on a motion for a preliminary injunction, there is, of course, nothing for this Court to consider reviewing.

It should be noted, however, that as to the claim that respondents conspired with each other (P 24), not only is there no evidence to support the claim, but since petitioner expressly abandoned this claim in the District Court (R 1670) and deprived respondents of an opportunity to adduce evidence addressed thereto, it ill behooves petitioner to raise it here. See, *e.g., Schwartz* v. *S.S. Nassau,* 345 F. 2d 465, 466 (2d Cir. 1965); *United States* v. *Vitasafe Corp.,* 352 F. 2d 62, 63 (2d Cir. 1965); *River Plate and Brazil Conferences* v. *Pressed Steel Car Company, Inc.,* 227 F. 2d 60, 63 (2d Cir. 1955).

As to the claimed vertical conspiracy between respondent Chrysler Motors Corporation and its dealers, a reading of the Program (D 1 et seq.) on whose face petitioner founds its conspiracy claim, and the District Court's finding that "Chrysler not only sets the amount of the rebate, but also unilaterally controls the terms and conditions under which it is granted, receives the completed forms and pays the rebate to the ultimate taxi purchaser" (283 F. Supp. at 888), keep this Program well within the legal "contractual boundaries of [the manufacturers] relationship with individual dealers." *United States* v. *General Motors Corp.*, 384 U.S. 127, 143 (1966); see also *Webster* v. *Packard Motor Co.*, 243 F. 2d 418 (D.C. Cir.), cert. denied, 355 U.S. 822 (1957). Indeed, even if the dealers were to promote and advertise the Program to its extreme, without some evidence of collaboration between the dealers and respondent no inference arises of an illegal contract or conspiracy, since, in so promoting the Program, the dealers would be acting solely out of simple individual self-interest. See, e.g., *Dipson Theatres* v. *Buffalo Theatres*, 190 F. 2d 951, 956 (2d Cir. 1951), *cert. denied*, 342 U.S. 926 (1952); *Delaware Valley Marine Sup. Co.* v. *American Tobacco Co.*, 297 F. 2d 199, 206 (3rd Cir. 1961), *cert. denied*, 369 U.S. 839 (1962). What Petitioner must show in claiming an illegal vertical conspiracy, which admittedly it has not, is at least "* * * joint and collaborative action * * * pervasive in the initiation, execution and fulfillment of the plan * * * [that cannot] be described as 'unilateral' or merely 'parallel.'" *United States* v. *General Motors Corp.*, above at 145. Thus, there is no question of law raised that would be appropriate for review by this Court.

Conclusion

Petitioner has not advanced any justification for granting the writ and certiorari should be denied.

Respectfully submitted,

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UPREME COURT, U. S.

APR 16 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1156

CHECKER MOTORS CORPORATION,

Petitioner,

v.

CHRYSLER CORPORATION and CHRYSLER MOTORS CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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IN THE

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CHECKER MOTORS CORPORATION,

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CHRYSLER CORPORATION and CHRYSLER MOTORS CORPORATION,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

Reply to Respondents' Counterstatement of the Case

At the outset, respondents argue that because the appeal below was from the denial of a preliminary injunction, this Court should not grant certiorari at this stage of the case.

However, respondents concede that the present challenge to Chrysler's rebate plan is grounded on petitioner's contention that the plan is, on its face, a *per se* violation

of Section 1 of the Sherman Act and they overlook the issue framed by the Court of Appeals itself, which was:

> "Is Chrysler's rebate plan a price fixing arrangement, and, thus, illegal per se under § 1 of the Sherman Act; if so, plaintiff may have been entitled to final judgment on the merits." (Appendix B, p. B4.)

The Court of Appeals thus was of the view that if the Chrysler plan were held to be a price fixing contract, combination or conspiracy, Checker could be entitled to final judgment on the merits. Hence, a review by this Court of the legal questions involved is entirely appropriate at this stage of the case.

Moreover, we again urge that the decisions in this case of the District Court and Court of Appeals, which permit a manufacturer, through the use of a rebate plan, to retain a considerable degree of control over the ultimate retail price paid by the customers of the manufacturer's dealers, have created a glaring loophole in the antitrust laws which requires prompt correction by this Court and that certiorari should therefore be granted.

As for respondents' attacks on Checker and its chief executive, Mr. Morris Markin, which are grounded in large measure on an article in the *New York Daily News,* these charges have been refuted in detail in the affidavits reproduced at 152a-197a and are in any event irrelevant to the legal question of whether the Chrysler rebate plan is a *per se* violation of Section 1 of the Sherman Act.

I

Respondents' brief deliberately ignores the decisions of this Court holding that a manufacturer may not affect the resale price of his product once it has left his control.

Not only does respondents' brief fail to come to grips with the numerous decisions of this Court proscribing all forms of price fixing, which are cited and discussed in the petition, but respondents completely ignore the line of cases, relied on by petitioner, which hold that once a "manufacturer parts with dominion over his product or transfers risk of loss to another, he may not reserve control of its destiny or the conditions of its resale" or seek to tamper with or control the product's resale price. *United States* v. *Arnold, Schwinn & Co.*, 338 U. S. 365, 379 (1967); *Simpson* v. *Union Oil Co.*, 377 U. S. 13 (1964); *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 721 (1944).

Respondents quote with approval (Resp. Br., p. 3) the finding of the District Court that:

> "Chrysler distributes its vehicles to the public via a nationwide system of independent franchised dealers . . . [who] upon purchasing automobiles from it, assumes the risk of loss and independently determines the retail price of automobiles purchased by it from Chrysler for sale." 23 F. Supp. at 879,

but fail to address themselves to petitioner's contention that once the dealer has negotiated a retail price with his customer, Chrysler re-injects itself into the pricing structure by granting the customer a $183 cash refund from whatever initial retail price has been negotiated, thereby clearly affecting the ultimate price paid by the retail customer.

Respondents urge that this Court's recent decision in *F.T.C.* v. *Fred Meyer,* 390 U. S. 341 (1968), stands for the proposition that cash rebates given by manufacturers to "retail customers" of their wholesalers are legal under the antitrust laws. The *Fred Meyer* case, which involved Section 2(d) of the Robinson-Patman Act, stands for no such principle. That case involved cash rebates given by manufacturers to *retailers.* In terms of the case at bar, it would involve a cash rebate given by Chrysler to its *dealers* (i.e., its retailers), leaving it up to the dealers to determine whether and how much of the rebate should be passed on to the consumers.

But this is precisely what Chrysler has not done. Nowhere in their brief do respondents deny our contention that Chrysler deliberately refrained from giving the rebate to the dealers because Chrysler did not want the dealers to have the discretion of keeping all or part of the rebate for themselves and of competing with each other with respect to the rebate's destiny. Indeed, respondents expressly admitted in their brief in the Court of Appeals that this was Chrysler's objective (see Petition, p. 11).

While the Robinson-Patman Act decision in the *Fred Meyer* case is irrelevant to the case at bar, we should note that Mr. Justice Harlan, in his dissenting opinion in *Fred Meyer,* addressed himself to a Sherman Act question which is relevant to our case, when he stated:

> ". . . The supplier could deal through his wholesalers, imposing restrictions on them to guarantee that an 'allowance' is actually passed through to retailers, only by running afoul of the Sherman Act." (390 U. S. at 361)

The principal issue in the case at bar is whether Chrysler's admitted device to guarantee that the cash rebate will be passed on to the consumers, instead of permitting the dealers to decide for themselves, in a competitive context, whether to pass on all or part of the price cut, is a violation of the Sherman Act.

II

The record shows the existence of a "contract, combination, or conspiracy".

Instead of addressing themselves to the recent decision of this Court in *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134 (1968), which holds that a parent corporation can conspire with its wholly-owned sales subsidiary in setting up a marketing plan, respondents completely ignore the case and maintain that Checker somehow "waived" this argument in the District Court. As we pointed out in deail in our reply brief in the Court of Appeals (pp. 14-16), Checker never waived or abandoned its contention that the Chrysler rebate plan is a contract, combination or conspiracy between Chrysler Corporation (the manufacturer) and Chrysler Motors Corporation (the sales organization). And even if there had been such a "waiver", this Court rejected a similar waiver argument by defendants in *Perma Life*, saying:

> "The gist of petitioners' cause of action has been clear from the outset, and respondents will in no way be prejudiced if petitioners are permitted to rely on these alternative theories of conspiracy." (392 U. S. at 142)

As for petitioner's alternative contention that there was also a contract, combination and conspiracy between respondents and their dealers who actively promote the rebate plan, respondents' rebuttal that their dealers are "acting solely out of simple individual self-interest" does not immunize a price fixing arrangement from the reach of Section 1 of the Sherman Act.

As this Court stated in *United States* v. *Arnold, Schwinn & Co.*, 338 U. S. 365, 375 (1967): "The promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct". And in *United States* v.

General Motors, 384 U. S. 127, 142 (1966), this Court held:

> "It is of no consequence, for purposes of determining whether there has been a combination or conspiracy under § 1 of the Sherman Act, that each party acted in its own lawful interest."

CONCLUSION

For the reasons stated in the petition and in this reply brief, petitioner respectfully prays that a writ of certiorari be granted.

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